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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LEW WARDEN,

Petitioner,

vs

THE STATE BAR OF CALIFORNIA,
LORNA MAYNARD, CAROLE ROSSI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

VOL. I
Appendices A - C, pp. 1-122

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APPENDIX A

OPINION, CALIFORNIA SUPREME COURT

FILED
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Supreme Court of California

IN THE SUPREME COURT OF CALIFORNIA

LEW WARDEN,	)	SO60702
Plaintiff and	)	
Appellant,	)	Ct.App. 1/5
	)	AO72485
v.	)	
	)	
THE STATE BAR OF CALIFORNIA, et al.,	)	Alameda County Super. Ct.
	)	No. 734372-4
Defendants and Respondents.	)	
	)	

In this proceeding, plaintiff Lew Warden, an attorney and member of the State Bar of California (State Bar or Bar), challenges the validity of this state's mandatory (or minimum) continuing legal education (MCLE) program, established pursuant to statute and court rule and administered by the State Bar. Among other claims, plaintiff contends that the current MCLE program violates his right to the equal protection of the laws, because a number of categories of currently licensed attorneys--retired judges, officers and elected officers and elected officials of the State of California, and full-time law professors at

SEE DISSENTING OPINIONS

accredited law schools--are exempt from the MCLE requirements.

The trial court rejected plaintiff's constitutional claims and granted summary judgment in favor of defendants (the State Bar and a number of its employees). On appeal, the Court of Appeal reversed the judgment, concluding that the challenged exemptions from the MCLE program are arbitrary and irrational and thus invalid even under the "rational relationship" equal protection standard that the Court of Appeal found applicable in this setting. Furthermore, the majority opinion in the Court of Appeal, expressing the views of two justices, went on to conclude that the proper remedy for the equal protection violation it had found was the invalidation of the MCLE program in its entirety. The third Court of Appeal justice, while agreeing with the majority that the exemptions were constitutionally flawed, concluded that the appropriate remedy for the equal protection violation was to eliminate only the invalidated exemptions, thereby preserving the MCLE program and extending its requirements to the formerly exempt categories of attorneys as well as to all nonexempt attorneys.

We granted the State Bar's petition for review to consider whether (1) the MCLE program violates federal or state equal protection principles by exempting the specified categories of attorneys from the MCLE requirements, and (2) if so, what the appropriate remedy should be.

As explained hereafter, we conclude that, although the wisdom of some or all of the exemptions may be questioned as a

matter of policy, the challenged exemptions may not be found unconstitutional under a proper understanding of the applicable equal protection standard as established by the governing decisions of both the United States Supreme Court and this court. In light of this determination, there is no need to reach the question of the appropriate remedy were the exemptions to be unconstitutional.

I

The MCLE program in California--a consumer protection measure "intended to enhance the competency of attorneys practicing law in this state" (People v. Ngo (1996) 14 Cal.4th 30, 36)--is a product of legislative action, court rule, and State Bar regulations. [Fn. 1.] In 1989,

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Fn. 1. At the time the California MCLE program was adopted in December 1990, 35 states already had adopted MCLE programs. Since 1990, four more states, in addition to California, have adopted MCLE programs. (See N.Y. State Bar Assn. Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 1998 (1998) pp. 4-8 (hereafter Comparison of MCLE Rules as of July 1998); N.Y. Comp. Codes R. & Regs., tit. 22, pt. 1500, Mandatory Continuing Legal Education for Attorneys in New York.) New York is the most recent state to have adopted an MCLE program, effective December 31, 1998. (See Pfau, CLE for New York Attorneys: Ensuring the Tradition of Professionalism

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the Legislature enacted Business and Professions Code section 6070, which required the State Bar to request this court to adopt a rule of court authorizing the Bar to establish and administer an MCLE program. (Bus. & Prof. Code, sec. 6070), subd. (a). [Fn. 2.] The statute specified a number of details concerning the rule that the State Bar was to request, including the provision that a member of the Bar who failed to satisfy the MCLE requirements would be enrolled as an inactive member and thus be unauthorized to practice law in this state until these requirements were met. (Ibid.)

Section 6070 also includes a separate subdivision--subdivision (c)--that exempts certain categories of attorneys from the reach of the statute, providing that "retired judges, officers and elected officials of the State of California, . . . full-time professors at law schools accredited by the State Bar of California, the American Bar Association, or both [and] . . . [f]ull-time employees of the State of California, acting within the scope of their employment, shall be exempt

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[Fn. 1, cont.]
(Jan. 1999) 71 N.Y.St.B.J. 8.) In most states, MCLE has been established through a rule adopted by the state supreme court. (See Comparison of MCLE Rules as of July 1999, supra, at pp. 4-8.)

Fn. 2. Unless otherwise indicated, all further references are to the Business and Professions Code.

from the provisions of this section." [Fn. 3.]

Following the passage of section 6070, the State Bar requested this court to adopt an MCLE rule. After considering public comment, this court adopted rule 958 of the California Rules of Court, effective December 6, 1990. That rule requires the State Bar to establish and administer an MCLE program, beginning January 1, 1991, "under rules adopted by the Board of Governors of the State Bar." Rule 958, like section

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Fn. 3. Section 6070 provides in full: "(a) The State Bar shall request the California Supreme Court to adopt a rule authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that within designated 36-month periods, all active members of the State Bar shall complete at least 36 hours of legal education activities approved by the State Bar or offered by a State Bar approved provider, with eight of those hours in legal ethics or law practice management, four hours of which shall be legal ethics. If the California Supreme Court adopts a rule authorizing the State bar to establish and administer the program, the State Bar shall establish and administer a mandatory continuing legal education program commencing on or after January 1, 1991. A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to

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6070, specifies a number of details relating to the MCLE program, and exempts some attorneys from the MCLE requirements. Under rule 958, (1) attorneys exempt under section 6070, (2) full-time federal employees, acting within the scope of their employment, and (3) attorneys "exempt under

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Fn. 3, cont.

"(b) For purposes of this section, statewide associations of public agencies and incorporated, nonprofit professional associations of attorneys, shall be certified as State Bar approved providers upon completion of an appropriate application process to be established by the State Bar. The certification may be revoked only by a majority vote of the board, after notice and hearing, and for good cause shown. Programs provided by the California District Attorneys Association or the California Public Defenders Association, or both, including, but not limited to, programs provided pursuant to Title 1.5 (commencing with Section 11500) of Part 4 of the Penal Code, are deemed to be legal education activities approved by the State Bar or offered by a State Bar approved provider.

"(c) Notwithstanding the provisions of subdivision (a), retired judges, officers and elected officials of the State of California, and full-time professors at law schools accredited by the State Bar of California, the American Bar Association, or both, shall be exempt from the provisions of this section. Full-time employees of the State of California, acting within the scope of their employ-

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MCLE requirements mandated by the rule. [Fn. 4.]

Contemporaneously with the adoption of California Rules of Court, rule 958, the Board of Governors of the State Bar adopted a set of rules and regulations to govern the operation of the MCLE program. (See State Bar Min. Cont. Legal Ed. Rules and Regulations, secs. 1.0-17.0, adopted by the Bd. of Governors of the State Bar on Dec. 8, 1990, and amended Sept. 1, 1995 (hereafter State Bar MCLE Rules and Regulations).) The regulations set out the five prescribed categories exempted from the MCLE requirements pursuant to section 6070 and rule 958--(1) retired judges, rules adopted by the Board of Governors of the State Bar" are not subject to the

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Fn. 3, cont.
ment, shall be exempt from the provisions of this section. Nothing in this section shall prohibit the State of California, or any political subdivision thereof, from establishing or maintaining its own continuing education requirements for its employees."

Fn. 4. Rule 958 of the California Rules of Court provides in full:

"(a) This rule is adopted under section 6070 of the Business and Professions Code.

"(b) The State Bar shall establish and administer a minimum continuing legal education program, beginning on or after January 1, 1991, under rules adopted by the Board of Governors of the State Bar. These rules may provide for carry[ing]

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(2) officers and elected officials of the State of California, (3) full-time professors at accredited law schools, (4) full-time employees of the State of California, and (5) full-time federal employees--and provide that the last two categories refer to public employees "who do not practice law in California except as employees of the State of California . . . [or] of the United States Government . . . ." (State Bar MCLE Rules & Regs., sec. 6.1.) In addition, the regulations include a provision--entitled "Good Cause Exemption From or Modification of Requirement"--that authorizes any member of the State Bar to "submit an application

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(Fn. 4, cont.)
forward of excess credit hours, staggering of the educational requirement for implementation purposes, and retroactive credit for legal education approved by the State Bar or offered by a State Bar approved provider completed prior to the effective date of the program.

"(c) Each active member of the State Bar (1) not exempt under Business and Professions Code section 6070, (2) not a full-time employee of the United States Government, its departments, agencies, and public corporations, acting within the scope of his or her employment, and (3) not otherwise exempt under rules adopted by the Board of Governors of the State Bar, shall, within 36-month periods designated by the State Bar, complete at least 36 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Eight of these hours

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setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Continuing Legal Education." State Bar MCLE Rules & Regs., sec. 6.3.) In addition, the regulations include a provision--entitled "Good Cause Exemption From or Modification of Requirement"--that authorizes any member of the State Bar to "submit an application setting forth good cause for an exemption from compliance with or modification of any of the [MCLE] requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum Continuing Legal Education. (State Bar MCLE Rules & Regs. sec. 6.3.) [Fn. 5.]

(Fn. 4, cont.)
shall address legal ethics or law practice management. One of the eight hours may, instead, be satisfied by legal education in the civil and criminal remedies available for civil rights violations. However, members shall complete no less than four of the eight hours in legal ethics. Members may be required to complete legal education in other specified areas within the 36-hour requirement under rules rules adopted by the State Bar. Each active member shall report his or her compliance to the State Bar under rules adopted by the Board of Governors of the State Bar.

"(d) A member of the State Bar who

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II

Under the provisions of rule 958, plaintiff, an actively enrolled member of the State Bar, was obligated to comply with the MCLE program. He acknowledges, however, that he did not do so. On April 23, 1993, the Bar, pursuant to its regulations (State Bar MCLE Rules & Regs., sec. 13.2), sent plaintiff a "Non-Compliance Notice," advising plaintiff of what he was required to do to comply with the MCLE requirements and informing him that he had 60 days from the date of the notification to comply with the

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(Fn. 5, cont.)
fails to satisfy the requirements of the State Bar's minimum continuing legal education program shall be enrolled as an inactive member of the State Bar under rules adopted by the Board of Governors of the State Bar.

"(e) The State Bar shall have the authority to set and collect appropriate fees and penalties."

Fn. 5.

Following the State Bar's adoption of the MCLE Rules & Regulations, the State Bar Committee on Minimum Continuing Legal Education adopted a set of Guidelines as "advisory interpretations" of the MCLE Rules and Regulations. (See Guidelines: MCLE Rules and Regulations (MCLE Guidelines).)

The MCLE Guidelines elaborate on a number of the exemptions. Under the guidelines, a retired judge, for purposes of the MCLE exemption, is one who has served

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with the requirements; the notice informed plaintiff that he would be enrolled as an inactive member if he did not submit proof of compliance by June 22, 1993. On June 29, 1993, the Bar sent plaintiff a final notice, advising him that his name would be submitted to the Board of Governors on July 17, 1993, with a recommendation that, effective July 19, 1993, he be enrolled as an inactive member of the Bar until he complied with the MCLE requirements.

On July 9, 1993, plaintiff wrote to the MCLE compliance coordinator of the State Bar, asserting that the MCLE program was unconstitutional and that he should not be prohibited from practicing law for refusing to comply with its requirements. On July 23, a senior administrative assistant of the Bar's legal unit acknowledged receipt of plaintiff's

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(Fn. 5, cont.)
as a judge of a court of record in California or another jurisdiction, has retired from the bench, and is either immediately qualified to receive retirement or pension benefits or is vested in such benefits and is entitled to receive them in the future. (MCLE Guidelines, sec. 6.1.1.) A law professor, for purposes of the MCLE exemption, is a full-time teacher at an accredited law school, regardless of the academic title given by the law school. (Id. sec. 6.1.3.)

With respect to the exemption for attorneys who are full-time state or federal employees, the MCLE Guidelines provide that such attorneys are exempt from

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letter, which had been forwarded by [sic] the Bar's Office of General Counsel for response. On July 30, the Bar sent plaintiff a notice of enrollment on administrative inactive status, informing him that effective July 19, 1993, he was ineligible to practice law in California until the Bar received proof of his compliance with the applicable MCLE requirements.

On September 23, 1993, plaintiff responded to the notice that he had been enrolled as an inactive member by a letter to the State Bar expressing his "profound disagreement" with the MCLE program and threatening to sue the Bar and its employees for damages if it did not "forthwith recall [its] suspension order." On October 7, 1993, plaintiff filed with the State Bar a "Claim of Damage," in which he asserted that as a result of its enrollment of him as an inactive member for noncompliance with the MCLE requirements, the State Bar was liable to him in an amount of $6,000

(Fn. 5, cont.)
the MCLE requirements "only if the sole legal work done by the attorneys is within the scope of their employment. If these attorneys engage in any legal activity outside the scope of their employment, including pro bono work or legal work for the attorney personally, close friends or immediate family, the attorney is not covered by the exemptions . . . and must comply with the full MCLE requirements." (MCLE Guidelines, secs. 6.1.4, 6.1.5, original italics.) More recently, the treatment of pro bono activities by such attorneys has

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per month for lost income and an unspecified amount for "emotional distress." On October 27, the Bar's Assistant General Counsel responded to plaintiff's correspondence in a letter that explained the manner in which the MCLE program had been developed and that indicated that plaintiff's October 7 Claim of Damage had been forwarded to the Board of Governors for review.

After the Board of Governors denied his claim for damages, plaintiff filed the complaint in the present action, naming the State Bar and various employees as defendants, and seeking compensatory and punitive damages, declaratory relief, an injunction, and a writ of mandate. In his complaint, plaintiff maintained that the MCLE program was unconstitutional in numerous respects, asserting that the program had denied him procedural and substan-

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(Fn. 5, cont.)
been modified by the adoption of section 6.1.6 of the State Bar MCLE Rules & Regulations, which provides that "[e]ffective February 1, 1997, members otherwise exempt from the continuing legal education requirements pursuant to sections 6.1.4 and 6.1.5 [i.e., full-time state and federal employees] may provide pro bono legal services through a qualified legal services project or support center . . . provided that the pro bono project or support center ensures that members volunteering pursuant to this section have received the necessary training or otherwise possess the necessary skills to provide quality service and maintain professional standards."

tive due process of law and equal protection of the laws. Among other claims, plaintiff contended that the MCLE program violated his right to equal protection by exempting certain categories of attorneys from its requirements.

The State Bar moved for summary judgment or, in the alternative, for summary adjudication of issues. (Code Civ. Proc., sec. 437c.) After a hearing, the trial court granted summary adjudication in favor of the Bar on all issues submitted by the Bar, thus effectively disposing of all aspects of plaintiff's constitutional challenge. Plaintiff filed a motion for reconsideration, and, after the court filed a formal order granting summary judgment in favor of defendants, plaintiff filed a motion for a new trial. The trial court denied both motions, and plaintiff appealed.

In resolving the appeal, the Court of Appeal focused almost entirely on plaintiff's equal protection claim, and in particular the claim that the MCLE program denied plaintiff equal protection of the laws because the program unjustifiably exempted certain categories of attorneys from the MCLE requirements that applied to plaintiff and all other nonexempt attorneys. After concluding that plaintiff had standing to raise this claim, the Court of Appeal first rejected plaintiffs' contention that his equal protection challenge to the classifications drawn by the MCLE program properly should be evaluated under the "strict judicial scrutiny" test, and instead agreed with the State Bar's position that the ordinary "rational basis" standard of review is applicable in this context. Nonetheless, the Court of Appeal ultimately concluded that whereas the

exemptions for full-time state and federal employees who do not represent individual clients satisfy the rational relationship test, the exemptions for (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time professors at accredited law schools do not. Observing that "[t]he fact that a lawyer wins an election or is appointed to a state office does not mean that the lawyer is necessarily current in recent legal developments, well-versed in legal ethics, or an expert in law office management," and that "[i]f a state officer or elected official, a retired judge, or a law professor represents individual clients in private practice, the same legitimate interests of the public protection of such clients apply," the Court of Appeal concluded that no rational basis exists for these three exemptions.

As noted above, although all three Court of Appeal justices agreed that the three identified exemptions could not be sustained under the "rational relationship" equal protection standard, the justices parted company on the question of the appropriate remedy for the equal protection violation they had identified. Two justices, explaining that they could not find with confidence that the Legislature would have adopted section 6070 without the challenged exemptions, concluded that the appropriate remedy was to invalidate the MCLE program as a whole, leaving the Legislature "to start anew and initiate comprehensive legislative reform of [M]CLE, rather than to accept a judicial reformation of section 6070 manditorily expanding the burden of [M]CLE training to those the Legislature specifically exempted therefrom." The remaining

justice, dissenting from this aspect of the majority opinion, concluded that there was no need to "throw[] the baby out with the proverbial bathwater" and suggested that the better and more appropriate solution was to excise the offending exemptions (which the justice observed apparently applied to only a few hundred attorneys) rather than to invalidate the MCLE program as a whole.

Both plaintiff and the State Bar filed separate petitions for review in this court. We granted only the State Bar's petition for review, which presented two principal issues: (1) whether the Court of Appeal properly found that the exemptions for retired judges, state officers and elected officials, and full-time professors at accredited law schools denied plaintiff the equal protection of the laws, and (2) if so, whether the Court of Appeal correctly concluded that the appropriate remedy is to invalidate the MCLE program as a whole, rather than to extend the MCLE requirements to the previously exempted attorneys. [Fn. 6.]

III

We begin with the question whether the

Fn. 6.

As noted, the Court of Appeal did not find that the exemptions for full-time state or federal attorneys denied plaintiff equal protection of the laws. That court also rejected plaintiff's claims that his rights were violated by the State Bar's reliance upon his last name (whose alphabetical order governed

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state's exemption of (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time professors at accredited law schools from a generally applicable MCLE program denies plaintiff the equal protection of the laws. As we shall explain, we agree with the Court of Appeal that the applicable equal protection standard of review in this context is the "rational relationship," rather than the "strict scrutiny," standard, but we further conclude that the Court of Appeal erred in determining that the exemptions in question can be found unconstitutional under a proper understanding and application of the rational relationship standard.

(Fn. 6, cont.)
the onset of his initial period for MCLE compliance) and by application of the MCLE requirements to a person of his advanced age, rejecting as well his contention that the Bar and its employees may be sued for damages. We denied plaintiff's petition for review, and we see no reason to disturb the Court of Appeal's conclusions on these issues.

Although the Court of Appeal declined to address plaintiff's substantive or procedural due process challenges to the MCLE program, we conclude that these claims clearly lack merit and that the trial court properly rejected them. (See Verner v. State of Colo. (10th Cir. 1983) 716 F.2d 1352, 1353, cert. den. 466 U.S. 490 ["[A] state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a 'rational connection with the [attorney's] fitness or capacity to practice law.' [Citations.] We cannot say that the CLE requirements in Colorado have no rational connec-

A

In D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, we described the two principal standards or tests that generally have been applied by the courts of this state and the United States Supreme Court in reviewing classifications that are challenged under the equal protection clause of the Fourteenth Amendment of the United States Constitution or article I, section 7, of the California Constitution. As the court in D'Amico explained: "The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption

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(Fn. 6, cont.)
tion to a lawyer's suitability to practice law."]; Matter of Smith (1997) 189 Ariz. 144 [939 P.2d 422, 424] [upholding Arizona's MCLE requirements.].) Because plaintiff was provided notice of his noncompliance with the existing MCLE requirements, and did not claim that he had complied with, or was exempt from, those requirements, there were no factual questions to be resolved by a hearing, and under such circumstances the State Bar's nondiscretionary ministerial action of placing plaintiff on inactive status without a hearing did not deny him procedural due process. (See, e.g., Matter of Smith, supra, 939 P.2d 422, 424; Codd v. Velger (1977)

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of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it." (11 Cal.3d at pp. 16-17, italics in original.)

The court in D'Amico further explained that "a more stringent test is applied . . . in cases involving 'suspect classifications' or touching on fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' [Citation.]" (11 Cal.3d at p. 17.) [Fn. 7.]

In arguing that heightened "strict scru-

(Fn. 6, cont.)
429 U.S. 624, 627-628; DeGenova v. State Board of Education (1955) 45 Cal.2d 255, 259-263; cf. Coleman v. Department of Personnnel Administration (1991) 52 Cal.3d 1102, 1112-1118; see generally 2 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure (2d ed. 1992) sec. 17.8, pp. 645-646.)

Fn. 7.
Since the 1974 decision in D'Amico, supra, 11 Cal.3d 1, the United States Supreme Court has adopted an "intermediate" standard

tiny," as contrasted with the ordinary "rational relationship" standard of review should be applied in determining whether the exemptions within the MCLE program violate the equal protection guarantee, plaintiff relies primarily on a series of decisions of the United States Supreme Court and this court that describe the right to "engage in any of the common occupations of life" as a "fundamental" right or liberty for the purpose of the due process clauses of the federal and state Constitutions. (E.g., Meyer v. Nebraska (1923) 262 U.S. 390, 399; Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 75; Conway v. State Bar (1989) 47 Cal.3d 1107, 1113.) Plaintiff reasons from these decisions that legislation or court

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(Fn. 7, cont.)
of review that it has applied in cases involving classifications that discriminate on the basis of gender or illegitimacy. (See, e.g., Craig v. Boren (1976) 429 U.S. 190, 197 ["To withstand constitutional challenge . . . classifications by gender must serve important governmental objective and must be substantially related to the achievement of those objectives."]; Clark v. Jeter (1988) 486 U.S. 456, 461 ["Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."]; see generally 3 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, supra, sec. 18.3, pp. 16-19.) In the present proceeding, no party has argued that this intermediate standard of review is applicable, and there is no authority that would support its application in this context.

rules that draw distinctions or create classifications relating to the practice of law impinge upon a "fundamental right" for equal protection purposes and are therefore subject to strict scrutiny.

In Hernandez v. Department of Motor Vehicles (1981) 30 Cal.3d 70, we explained the fallacy in this reasoning in addressing a somewhat related contention. As we noted in Hernandez: "Plaintiff's reliance on this line of procedural due process cases appears to rest upon an assumption that whenever a 'property' or 'liberty' interest is accorded the protections of procedural due process, that interest becomes a 'fundamental constitutional right' so that legislative measures regulating such an interest are necessarily subject to strict scrutiny. This assumption is totally unfounded. Recent decisions have established that the whole panoply of ordinary property rights are generally protected from summary termination or deprivation by procedural due process [citations] but no case has even remotely suggested that the constitutionality of substantive legislative measures regulating or restricting such 'protected property' rights are to be judged under a 'strict scrutiny' standard.'" (30 Cal.3d at p. 81, fn. omitted; see also Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 789.)

In Bib'le v. Committee of Bar Examiners (1980) 26 Cal.3d 548, addressing an equal protection challenge to a State Bar rule that accorded differential treatment to Bar applicants on the basis of whether they attended accredited or unaccredited law schools, we rejected the plaintiff's contention that the challenged classification "must be subject to strict scrutiny and supported by a compelling state interest." (26 Cal.3d at

p. 554.) We explained: "This court has articulated the appropriate test in examining claims of discrimination in occupational and professional licensing. 'The conventional "rational relationship" test is traditionally applied in cases involving occupational licensing . . . .' [Citation.] . . . Accordingly, the rules here under attack have a presumption of constitutionality and require only that the distinctions drawn bear some rational relationship to a conceivable legitimate state purpose. [Citations.]" (Id. at p. 555.)

Plaintiff claims that the holding in Bib'le on this point should not be applied to the classification here at issue, because the classification in Bib'le affected only persons who were not yet members of the Bar, whereas the classifications challenged in the present case apply to individuals who already have been admitted to the Bar. But past authorities make it clear that the rational relationship standard applies to classifications involving those persons who already have obtained professional or occupational licenses, as well as to those applying for such licenses. (See, e.g., Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488-489; Semler v. Dental Examiners (1935) 294 U.S. 608, 610-611; Ramirez v. Oregon State Bar (9th Cir. 1989) 887 F.2d 1089, 1089; Wachs v. Curry (1993) 13 Cal.App.4th 616, 624.) [Fn. 8.]

Fn. 8.

As this court noted in D'Amico, supra, 11 Cal.3d 1, 17, there are some cases involving equal protection challenges to occupational or professional regulations in which more stringent scrutiny has been applied, but those cases "invariably involved a clas-

Thus, we agree with the Court of Appeal that plaintiff's equal protection challenge to the exemptions to the MCLE program properly must be evaluated under the traditional "rational relationship" standard. (See also Verner v. State of Colo. (D. Colo. 1982) 533 F.Supp. 1109, 1118, aff'd. (10th Cir. 1983) 716 F.2d 1352 [applying rational relationship standard in determining validity of exemption from state MCLE program].) [Fn. 9.]

B

As noted, although we agree with the Court of Appeal's conclusion that the rational relationship standard applies here, we disagree with the appellate court's further conclusion that, under this standard, the exemp-

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(Fn. 8, cont.)
sification drawn along lines which rendered it 'suspect' in constitutional terms." (See, e.g., Raffaelli v. Committee of Bar Rxaminers (1972) 7 Cal.3d 288, 291-294 [discrimination based on alienage]; Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, 16-20 [discrimination based on gender]; Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288 [discrimination against nonresident].)

Fn. 9.
Although he did not raise the point below, in this court plaintiff argues that because this court possesses "plenary authority" to regulate the practice of law (see generally In re Attorney Disciple System (1998) 19 Cal. 4th 582, 592-593), we may "strictly scrutinize" the challenged exemptions and invalidate them if the court finds they improperly discriminate

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tions to the MCLE program at issue are unconstitutional. As we shall explain, we believe the determination reached by the Court of Appeal rests upon a misapplication of the rational relationship standard.

As both the United States Supreme Court and this court have explained on many occasions, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there

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(Fn. 9, cont.)
against plaintiff and other California attorneys.

Constitutional guarantees protect an individual from impermissible discrimination by the state, whether the state acts through legislative action or court rule (see, e.g., Ex parte Virginia (1880) 100 U.S. 339, 346-347; Bates v. State of Arizona (1977) 433 U.S. 350; Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274), and plaintiff cites no authority suggesting that the rational relationship equal protection standard does not apply to the determination of the constitutionality of classifications in an MCLE program that are established by a judicial rule, as well as to classifications that are embodied in a legislative enactment. (See Verner v. State of Colo., supra, 533 F.Supp. 1109, 1118 [applying rational relationship standard in evaluating equal protection challenge to MCLE requirements imposed by court rule]; see also

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are 'plausible reasons' for [the classification] 'our inquiry is at an end.'" (FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, quoting U.S. Railroad Retirement Bd. v. Fritz (1980) 449 U.S. 166, 179, italics added; see, e.g., Central State University v. Amer. Assoc. of University Professors (1999) ___ U.S. ___ [119 S.Ct. 1162,

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(Fn. 9, cont.)
Adams v. Commission on Judicial Performance (1994) 8 Cal.4th 630, 658-661 [applying rational basis standard in reviewing equal protection challenge to judicially promulgated rule]; Knight v. Tape, Inc. (3d Cir. 1991) 935 F.2d 617, 627-630 [same].) Although Justice Kennard's dissenting opinion (post, at pp. 3-4) suggests that Frazier v. Heebe (1987) 482 U.S. 641 supports some form of "heightened scrutiny" when an equal protection challenge is to a court rule, in that case the United States Supreme Court decided the matter pursuant to its supervisory authority, rather than on constitutional grounds (see id. at p. 645), and, moreover, the rule at issue in Frazier discriminated against out-of-state attorneys, a classification that traditionally has been viewed as constitutionally suspect. (See Supreme Court of New Hampshire v. Piper, supra, 470 U.S. 274.) In any event, as the text of rule 958 itself indicates, the exemptions at issue in this case were adopted in deference to the legislative policy judgments embodied in the Legislature's enactment of section 6070, and thus we believe it is clearly appropriate to apply the traditional rational relationship standard here.

To the extent plaintiff's reference to this court's "plenary authority" constitutes

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1163]; Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 130-132.) Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. (See, e.g., American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, 371; Williamson v. Lee Optical Co., supra, 348 U.S. 483, 489 ["Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to

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(Fn. 9, cont.)
a request that we invoke our inherent quasi-legislative authority to amend or modify the provisions of rule 958, the present proceeding is not the appropriate avenue for pursuing such a request. In the complaint on which this action is based, plaintiff did not simply seek a change in the MCLE program for the future, but rather claimed that the existing requirements are invalid and, as a consequence, that the State Bar lacked authority to place him on inactive status for failing to comply with the existing requirements. The current proceeding thus concerns the validity of the MCLE program that resulted in defendant's placement on inactive status, and not whether, as a matter of policy, the existing exemptions should be retained or modified. In determining the validity of the challenged exemptions under the equal protection clause, we apply the rational relationship standard.

the phase of the problem which seems most acute to the legislative mind."].) As the United States Supreme Court has observed: "Defining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line may have been drawn differently at some points is a matter for legislative, rather than judicial consideration.'" (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315-316.)

In this case, the constitutional question is whether an MCLE program that generally requires attorneys licensed by the state to complete a specified number of continuing educational courses violates the federal or state equal protection clause by exempting retired judges, state officers and elected officials, and full-time professors at accredited law schools from the reach of the continuing education requirement. Although it may be that the wisdom of some or all of these exemptions is debatable as a matter of policy [Fn. 10.),

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Fn. 10.

The American Bar Association's commentary to its Model Rule for Minimum Continuing Legal Education recommends against the adoption of any exemptions to an MCLE program. (ABA Center for Legal Ed., Model Rule for Min. Continuing Legal Ed. (rev. 1996) com. to sec. 5.) Nonetheless, the great majority of the forty states that have adopted an MCLE program have exempted some categories of attorneys from their MCLE requirements. (See generally Comparison of MCLE Rules as of July 1998,

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we conclude that the Court of Appeal erred in finding that these three exemptions fail the traditional rational relationship test that applies in this context, because we do not believe it fairly can be said that there is no "reasonably conceivable state of facts facts that could provide a rational basis for the classification." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313.)

As we shall explain, there are at least two "plausible reasons" that rationally could support each of the exemptions in question. First, it would not have been irrational to conclude that the attorneys in each of the exempted categories, as a general matter, are less likely that other attorneys to represent clients on a full-time basis, thus rendering the need for a continuing education requirement less vital, as a matter of consumer protection, for these attorneys than for other attorneys. Second, it would not have been irrational to conclude that, in view of their

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(Fn. 10, cont.)
supra, at pp. 9-17.)

The most common exemption appears to be for attorneys over a specified age (usually 65 or 70), but several of the categories whose exemption is at issue in this case -- elected officials and legislators, and full-time law professors -- also have been exempted from MCLE requirements in a number of other states. (See Comparison of MCLE Rules as of July 1998, supra, at pp. 9-17 [Delaware (elected officials); Georgia (elected officials); Montana (legislators); North Carolina (full-time law-faculty); Oklahoma (legislators); Texas (full-time law faculty, except ethics requirement);

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particular professional roles and experience, the attorneys in each of the exempt classes (again, as a general matter) are less likely than lawyers in general to need continuing education courses in order to be familiar with recent legal developments or to remain competent practitioners.

Thus, with respect to the category of retired judges, it would not be irrational to conclude that such individuals, as a class, are less likely than other attorneys to represent clients on a full-time basis after their retirement from the bench, both because, after retirement, such judges may be likely to scale back the overall time spent on legal work, and because, when they do engage in professional endeavors, they are more likely to serve as assigned judges, mediators, or arbitrators (or in similar roles) than to represent individual clients. Furthermore, because of the high level of legal skills and qualifications that generally are required to obtain a position as a judge, and because the daily work of a judge involves constant exposure to and analysis of on-going developments in the law, it would not be irrational to conclude that it is less necessary, for the protection of the public, to extend the MCLE requirements to this small category of attorneys than to other attorneys.

Similarly, with respect to the category of officers and elected officials of the

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(Fn. 10, cont.)
Washington (legislators)].) Many states also exempt judges from their MCLE requirements (ibid.), but it is not clear whether this exemption in other states applies to retired judges.

State of California, it would not be irrational to conclude that because of the considerable amount of time required for the performance of their public duties, such individuals, as a class, are less likely than attorneys as a whole to represent clients on a full-time basis, and that when such individuals do represent clients in the limited time available, they are likely to do so in areas in which they have some particular current expertise or familiarity. Furthermore, because the work of legislators and state officers is devoted, in substantial part, to the review of the current state of the law and the consideration of proposals to modify the law, or to the implementation of recent changes in the law, it would not be irrational to conclude that this group of attorneys, as a whole, may be less in need of MCLE courses than other attorneys, in order to remain abreast of recent developments in the law.

Finally, with respect to the category of full-time professors at accredited law schools, it again would not be irrational to conclude that because of the amount of time such professors devote to their teaching and other academic pursuits, this category of attorneys is less likely than attorneys as a whole to represent clients on a full-time basis, and, when they do represent clients, less likely that they will engage in legal work outside their area of particular expertise. Moreover, because of the outstanding academic qualifications generally required to obtain a position as a full-time professor at an accredited law school, because the work of a full-time law professor requires the intensive study, analysis, and teaching of the current state of the law, and because full-time professors at accredited law schools function in an academic setting in which lectures, publications, and frequent faculty

discussions typically encompass recent developments in all areas of the law, here too it would not be irrational to conclude that it is less necessary, for the protection of the public, to extend the MCLE requirements to this category of attorneys than to other attorneys.

We emphasize that in assessing the rationality of each of the exemptions in question, we appropriately must evaluate the classifications as a whole. Although some individuals within each of these classifications may be as much in need of MCLE courses as other attorneys, in view of the wide berth the state traditionally is given when a suspect classification or fundamental right is not at issue, the exemptions in question cannot properly be found to be irrational or arbitrary under the traditional, deferential, rational relationship standard. (See, e.g., Williams v. Kapilow & Sons (1980) 105 Cal. App.3d 156, 162-163.) [Fn. 11.]

In reaching a contrary conclusion, the Court of Appeal relied in part upon language from this court's opinion in Cooper v. Bray (1978) 21 Cal.3d 841, a decision that struck down, on equal protection grounds, a statutory provision that barred a passenger-owner of an automobile from recovering personal injury damages against the driver of the vehicle unless the passenger-owner established that the injury proximately resulted from the intoxication or willful misconduct of the dri-

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Fn. 11.

Because we conclude that the exemptions in question are rationally related to a legitimate, reasonably conceivable public purpose, the classifications challenged here are dis-

ver. In the course of the decision in Cooper, the court stated that, in applying what it referred to as the "'restrained' equal protection standard of review" (21 Cal.3d at p. 847), a court is required "'to conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."'" (Id. at p. 848, quoting Newland v. Board of Governors (1977) 19 Cal.3d 705, 711.)

The Court of Appeal in the present case appears to have interpreted this language from Cooper as calling for a somewhat heightened, rather than a restrained, standard of review. This court, however, explained in Fein v. Permanente Medical Group (1985) 38 Cal.3d 137 (Fein) -- a decision reflecting an equal protection challenge to the validity of a provision of the Medical Injury Compensation Reform Act of 1975 (MICRA) -- that the Cooper formulation has "never been interpreted to mean that we may properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem." (38 Cal.3d at p. 163.) The court in Fein explained that in that case, as well as in the court's earlier MICRA decisions, our court had conducted the "serious and genuine judicial inquiry" referred to in Cooper by (1) finding that "the statutory classifications

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(Fn. 11, cont.)
tinguishable from those in D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, and Hays v. Wood (1979) 25 Cal.3d 772, in which the courts struck down statutory classifications after finding that they bore no rational relationship to a legitimate state interest.

are rationally related to the 'realistically conceivable legislative purpose[s]' (Cooper, supra, 21 Cal.2d at p. 851) of MICRA," and (2) by declining to "invent[] fictitious purposes that could not have been within the contemplation of the Legislature . . . ." (Fein, supra, 38 Cal.3d at p. 163, italics omitted.) [Fn. 12.]

We conclude that the exemptions at issue in the present case, like the classifications at issue in Fein, cannot be found unconstitutional under a proper application of the rational relationship test. The explanations or justifications for the exemptions that we have noted above -- that the attorneys who fall within each category may be less likely than other attorneys to represent a significant number of clients on a full-time basis, or may be less likely than other attorneys to

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Fn. 12.

At the time Cooper, supra, 21 Cal.3d 841, and similar cases (see, e.g., Newland v. Board of Governors, supra, 19 Cal.3d 705, 711; Brown v. Merlo (1973) 8 Cal.3d 855, 865 & fn. 7) were decided by this court, there was some suggestion in the academic literature that the United States Supreme Court might be moving toward the adoption of a so-called "newer equal protection," which would provide a "new bite" for the traditional "rational basis" test (see generally Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972) 86 Harv.L.Rev. 1), and some of the analysis in those opinions may reflect that milieu. Since that time, the United States Supreme Court explicitly has adopted an "intermediate" equal protection standard of review

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need to attend continuing education classes in order to be aware of recent developments in the law or remain competent practitioners -- are "'realistically conceivable legislative purposes,'" rather than "fictitious purposes that could not have been within the the contemplation of the Legislature." (Fein, supra, 38 Cal.3d at p. 163, italics added.) And the exemptions are "rationally related" to the consumer protection purpose of the MCLE program insofar as they identify categories of attorneys who, as compared to other categories of attorneys, may not pose as serious a risk to consumers even if these attorneys are not subject to a continuing legal

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(Fn. 12, cont.)
that is applicable in cases involving classifications that discriminate on the basis of gender or illegitimacy (see, ante, fn. 7, pp. 13-14, but at the same time has reaffirmed the deferential nature of the restrained, "rational relationship" equal protection standard. (See, e.g., FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313-316.) Contrary to the suggestion in Justice Brown's dissenting opinion, this court's decision in Fein makes it clear that, under both the federal and state equal protection clauses, the rational relationship test remains a restrained, deferential standard, albeit one that continues to provide protection against classifications that do not bear a rational relationship to a reasonably conceivable, legitimate purpose. (See also Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal.4th 903, 913-924 [applying same rational relationship standard in evaluating equal protection claims under federal and California Constitutions]; Adams v. Commission on Judicial Performance, supra, 8 Cal.4th 630, 658-661 [same].)

education requirement. As we have explained, "[c]ountless constitutional precedents establish . . . that the equal protection clause does not prohibit [the state] from implementing a reform measure 'one step at a time' [Citation.]" (American Bank & Trust Co. v. Community Hospital, supra, 36 Cal.3d 359, 371.) These authorities teach that the equal protection guarantee neither requires nor authorizes a court to invalidate a consumer protection measure like the MCLE program simply because the program, as adopted, does not go as far as it might have in protecting consumers. (See, e.g., Railway Express v. New York (1949) 336 U.S. 106, 110 ["It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."]; McDonald v. Board of Education Commissioners (1969) 394) U.S. 802, 809 ["[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.""].) [Fn. 13.]

In declining to accept these justifications for the challenged exemptions, the Court of Appeal relied upon the circumstance that there was "no support' in the legisla-

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Fn. 13.

One amicus curiae argues that the three exemptions in question should be found unconstitutional because, unlike the exemption for full-time state and federal employees (see, ante, fn. 5), these exemptions are not lost if the exempt attorneys actually undertake to represent a private client. In view of the substantially greater number and diversity of attorneys included within the categories of

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tive history of section 6070 to indicate that these were the actual explanations of the rational or motivations for the adoption of the exemptions, and that "no member of the Bar or other person involved in the design of the [M] CLE program was willing to declare under penalty of perjury that the exemptions were based upon this theory . . . ." The Court of Appeal suggested, instead, that the legislative history of section 6070 "indicates the exempted groups were added in piecemeal fashion, benefiting certain lawyers who were serving in the Legislature or otherwise, and did not wish to be '"dragged into a classroom."'"

In relying, as a basis for its constitutional ruling, upon the absence of evidence in either the legislative history or in the court record to indicate that the proffered justifications for the exemptions were the actual motivation for the adoption of the exemptions, and upon its view that other, less lofty considerations constituted the actual motivation

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(Fn. 13, cont.)
state and federal attorneys, as compared with those falling within the three exemptions here at issue, we cannot find there is no rational basis for providing a narrower scope for the exemptions accorded to state and federal employees.

In any event, the governing authorities establish that under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect (see, e.g., Dandridge v. Williams (1970) 397 U.S. 471, 485) or because it may be "to some extent both underinclusive and overinclusive." (Vance v. Bradley (1979)

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for the enactment of such exemptions, the Court of Appeal failed to adhere to several fundamental tenets of the rational relationship standard of review. As the United States Supreme Court has explained: "[T]he absence of '"legislative facts"' explaining the distinction '[o]n the record' [citation] has no significance in rational-basis analysis. [Citations.] In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315, italics added; see also Heller v. Doe (1993) 509 U.S. 312, 320 ["A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."].) Furthermore, the high court has explained that when there is a reasonably conceivable justification for a classification, it is . . . 'constitutionally irrelevant whe-

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(Fn. 13, cont.)
440 U.S. 93, 108.) The circumstance that the scope of the various exemptions of the MCLE program could have been more congruent does not provide a sufficient basis to invalidate them under the rational relationship standard. (See, e.g., New York Transit Authority v. Beazer (1979) 440 U.S. 568, 593 ["Because [the classification] does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts in the classification as it is with respect to the classification as a whole." (Fn. omitted.)].)

ther [the] reasoning in fact underlay the legislative decision'" (U.S. Railroad Retirement Bd. v. Fritz, supra, 449 U.S. 166, 179, quoting Flemming v. Nestor (1960) 363 U.S. 603, 612), or whether the "conceived reason for the challenged distinction actually motivated the legislature." (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 315.) Thus, in instances in which the rational relationship standard is applicable, a classification that, in fact, is rationally related to a reasonably conceivable legitimate public purpose may not be set aside as denying the equal protection of the laws on the ground that the Legislature or other public policy maker that fashioned the classification may have acted out of what is perceived as self-interest or may have had some other asserted "politically motivated" purpose for supporting the measure. (Accord, County of Los Angeles v. Superior Court (Burroughs) (1975) 13 Cal.3d 721, 727 ["[T]he validity of a legislative act does not depend on the subjective motivations of its draftsmen but rests instead on the objective effect of the legislative terms."].)

Accordingly, we conclude that under a proper understanding and application of the "rational relationship" equal protection standard, the exemptions to the MCLE program here at issue cannot be found unconstitutional. The Court of Appeal erred in reaching a contrary conclusion. [Fn. 14.]

IV

The judgment of the Court of Appeal is reversed, and the matter is remanded to the Court of Appeal with directions to affirm the summary judgment in favor of defendants.

GEORGE, C.J.

WE CONCUR:

MOSK, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.

Fn. 14.

In endorsing the Court of Appeal's determination, Justice Kennard's and Justice Brown's dissenting opinions inappropriately fail to apply the rational relationship test in a deferential manner, and instead effectively treat that test as one that permits a court, when ruling on an equal protection challenge under that standard, to reweigh the policy choices that underlay a legislative or quasi-legislative classification or to reevaluate the efficacy of the legislative measure. Contrary to the implication conveyed by the terminology in Justice Kennard's dissent, our holding on the constitutional issue in this case is based not upon a determination or judgment that retired judges, elected officials, or full-time law professors "deserve exemption" from, or "do not need," the MCLE requirements (see dis. opn. of Kennard, J. at pp. 8, 9, 11), but simply upon a conclusion that the exemptions are not irrational or arbitrary. Thus, although it certainly would be reasonable for a policy-maker to conclude that it is as important to require part-time attorneys to complete continuing education courses as it is to require full-time attorneys to do so, it does not follow that it would be arbitrary or irrational for a policy-maker to determine that it is more important to impose such requirements on full-time attorneys who are likely to represent more clients, and to impose the require-

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DISSENTING OPINION BY KENNARD, J.

I dissent.

Unlike the majority, I agree with the Court of Appeal that as currently structured the State Bar's program of mandatory continuing legal education (MCLE), a program that this court established by court rule, denies California attorneys the equal protection of the law guaranteed by the state and federal Constitutions. The MCLE program denies equal protection by granting complete exemptions from all continuing education requirements, for no rational and legitimate reason, to retired judges, law school professors, and state officers and elected officials. I do not agree with the majority that this court is compelled to decide this equal protection issue -- particularly as it relates to the state Constitution -- by using the traditional rational basis standard. Nor do I agree with the majority that when the MCLE's program's exemptions are tested under that standard, they are justifiable.

STANDARD OF REVIEW

The United States Supreme Court and this court have enunciated three standards of review for deciding constitutional equal protec-

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(Fn. 14, cont.)
ment only on such attorneys. As the United States Supreme Court has made clear, a state need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (McDonald v. Board of Election Commissioners, supra, 394 U.S. 802, 809.)

tion challenges. (See generally Tribe, American Constitutional Law (2d ed. 1988) secs. 16-32, p. 1601 et seq.) For legislation containing a "suspect" classification, such as race, or touching upon a fundamental interest, such as voting, courts have been directed to apply strict scrutiny and to uphold the legislation only if its classification is precisely tailored to further a compelling governmental interest. (Adarand Constructors, Inc. v. Pena (1995) 515 U.S. 200, 227; Plyler v. Doe (1982) 457 U.S. 202, 216-217; Darces v. Woods (1984) 35 Cal.3d 871, 888; Johnson v. Hamilton (1975) 15 Cal.3d 461, 466.) For legislation discriminating on the basis of gender or illegitimacy, courts are to apply intermediate scrutiny and to uphold the legislation only if its classification serves an important governmental objective and is substantially related to the achievement of that objective. (United States v. Virginia (1996) 518 U.S. 515, 533; Craig v. Boren (1976) 429 U.S. 190, 197; In re Marriage of Flaherty (1982) 31 Cal.3d 637, 643, fn. 2.) Finally, when the conditions requiring either strict or intermediate scrutiny are absent, courts are to apply what is commonly called the "rational basis" standard of review, under which challenged legislation is rationally related to a legitimate governmental purpose. (Romer v. Evans (1996) 517 U.S. 620, 631; FCC v. Beach Communications, Inc. (1993) 508 U.S. (1993) 508 U.S. 307, 313; D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 16.)

The majority holds that the proper standard of review for the equal protection challenge in this case is the highly deferential rational basis standard. (Maj. opn. ante, at p. 12.) The majority justifies its selection of this standard by citing decisions holding that this minimal standard is appropriate for equal protection challenges to classifications in professional or occupa-

tional licensing laws. (See, e.g., Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488-489; D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, 17.)

Petitioner has challenged the MCLE requirements under the equal protection provisions of both the state and the federal Constitutions. In construing the California Constitution's equal protection guarantee, this court has not slavishly followed decisions of the federal high court construing the equal protection clause of the Fourteenth Amendment to the federal Constitution. (Compare Butt v. State of California (1992) 4 Cal.4th 668, 686 [education is fundamental right for equal protection purposes under the state Constitution] with San Antonio School District v. Rodriguez (1972) 411 U.S. 1, 37-39 [declining to give education the status of a fundamental right for purposes of federal equal protection].) Because the challenge here is brought under the state as well as the federal Constitution, we are not obligated to follow the many federal decisions that the majority fondly cites. Rather, when this court finds cogent reasons to chart a different course, "[w]e have the power and the duty to give independent meaning and force to the provisions of our state charter." (People v. Cahill (1993) 5 Cal.4th 478, 558 (dis. opn. of Kennard, J.).)

The rational basis standard of review, as traditionally applied, is not appropriate when the equal protection challenge is to a court rule. As this court has explained, traditional rational basis review "manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government." (D'Amico v. Board of Medical Examiners, supra, 11 Cal.3d 1, 16.) This justification for an effete standard of review is absent

when the equal protection challenge is not to a law enacted by a co-equal branch of government but to a court rule. The MCLE requirements that petitioner here challenges were not imposed by a bill passed by the Legislature and signed by the Governor, nor were they imposed by an initiative adopted by the voters. This court imposed the MCLE requirements by adopting rule 958 of the California Rules of Court. The restraint that this court could and usually does exercise when considering equal protection challenges to laws enacted by the Legislature, or by the voters through the initiative process, is unnecessary and unfitting when this court is deciding an equal protection challenge to a court rule. We owe ourselves no particular deference. The United States Supreme Court has itself subjected allegedly discriminatory court rules to a form of heightened scrutiny. (See, e.g., Frazier v. Heebe (1987) 482 U.S. 641.) This court likewise has a particular responsibility to ensure that classifications we impose by court rule do not discriminate arbitrarily.

The majority asserts that traditional rational basis review is appropriate because in adopting the court rule by which the MCLE program came into being this court was merely deferring to "legislative policy judgments embodied in the Legislature's enactment of [Government Code] section 6070." (Maj. opn. ante, at p. 17, fn. 9.) Responsibility for the MCLE program is not so easily shirked. Attorney admissions, education, and discipline are matters over which this court has inherent authority, as this court recently proclaimed in a decision authored by the Chief Justice. (In re Attorney Discipline System (1998) 19 Cal.4th 582, 592-593.) We quoted with approval a law review article's statement that "'In each state it is the supreme court, with or without the legislative approval, that dic-

tates the standards for education, admissions and discipline of attorneys.'" (Id. at p. 593, quoting Martineau, The Supreme Court and State Regulation of the Legal Profession (1980-1981) 8 Hastings Const.L.Q. 199, 202.) In enacting Government Code section 6070, the Legislature implicitly acknowledged this court's primacy in matters relating to attorney qualifications by merely directing the State Bar to request that this court adopt an MCLE program. This court was not required to accede to this request, much less accept all of the Legislature's suggestions about the program's details. In short, MCLE is this court's program, and deference to the Legislature should play no part in our review of its evident shortcomings.

Because the law challenged here is a court rule, not legislation enacted by a co-equal branch, the rational basis test, as traditionally applied, is unnecessarily and inappropriately weak and deferential. Because this court has plenary authority to determine the proper standards of review for equal protection challenges under the state Constitution, this court is not compelled to apply the conventional rational basis test. Instead, this court should conduct a thorough and unbiased inquiry into whether the exemptions are sufficiently related to the legitimate goals of the MCLE program to be enforced without denying practicing attorneys the equal protection of the laws guaranteed by our state Constitution. It is unnecessary to determine the precise standard that should be used, however, because the challenged exemptions are invalid even under the traditional rational basis test that the majority applies here.

APPLYING THE RATIONAL BASIS STANDARD

In applying the rational basis standard

of review, I begin by asking what purpose the MCLE requirements are intended to serve. I agree with the majority that the basic purpose of MCLE is consumer protection. The aim of continuing legal education is to provide continuing assurance to the public that all California attorneys, no matter how many years have passed since their law school graduation and State Bar admission, have the knowledge and the skills to provide their clients with high quality legal services.

To achieve this objective, the MCLE program requires that every three years, as a condition of maintaining their active State Bar membership, attorneys complete thirty-six hours of approved legal education, including at least four hours of legal ethics and an additional four hours of either legal ethics, law practice management, or civil rights remedies. (See Cal. Rules of Court, rule 958(c).) The State Bar, acting under authority conferred by this court (ibid.), has adopted implementing rules and regulations that require, in addition, that "[a]t least one [hour] shall relate to prevention, detection, and treatment of substance abuse and emotional distress, but no more than six [hours] shall relate to emotional distress," and that "[a]t least one [hour] shall relate to the elimination of bias in the legal profession based on any of, but not limited to the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation." (State Bar Min. Cont. Legal Ed. Rules and Regs.,sec. 2.1.)

Although serious questions have been raised about the effectiveness of the MCLE program as currently implemented, I here assume that in general the program is of legitimate value in protecting consumers by re-

ducing the incidence and seriousness of legal malpractice. Instruction in substantive law and legal procedure may reduce attorney mistakes in advising and representing clients. Instruction in legal ethics may prevent attorneys from harming their clients by unwitting ethical violations. Instructions in law office management may reduce mistakes caused by by improper handling of client funds, inadvertent missed filing deadlines, and the like. Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them. Finally, instruction in preventing, detecting, and treating substance abuse and emotional distress may avoid attorney mistakes and malpractice resulting from substance abuse and stress-related problems.

For present purposes, the essential question is not whether MCLE in general benefits consumers of legal services, but how exempting three groups of practicing attorneys from the MCLE requirements may be reconciled with this consumer protection purpose. Before addressing this question directly, I consider the majority's argument that the MCLE exemptions are largely immune from equal protection scrutiny because legislation need not be comprehensive and can address a problem piecemeal or only in those aspects where the need for regulation appears greatest. (Maj. opn. ante, at p. 18.) In Hays v. Wood (1979) 25 Cal.3d 772, 790, this court rejected reliance on the same authorities that the majority now cites "at least insofar as they relate to the application of the equal protection provisions of our state Constitution." We explained that the Legislature may not single out a group for regulation "wholly at its whim" but rather "its decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (Id. at pp. 790-791.) In

other words, there must be "'some rationality in the nature of the class singled out.'" (Id. at p. 791; see also FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 323, fn. 3 (conc. opn. of Stevens, J.) [stating his view that when a law "imposes a burden on one group but leaves unaffected another that is similarly, though not identically, situated, 'the Constitution requires something more than merely a "conceivable" or "plausible" explanation for the unequal treatment.'"].)

The majority proposes two justifications for exempting from all MCLE requirements those practicing attorneys who are retired judges, law professors, or state officers or elected officials. I examine these justifications in turn.

The majority states: "First, it would not have been irrational to conclude that the attorneys in each of the exempted categories, as a general matter, are less likely than other attorneys to represent clients on a full-time basis, thus rendering the need for a continuing education requirement less vital, as a matter of consumer protection, for these classes than for other attorneys." (Maj. opn., ante, at p. 19, italics in original.)

This proposed justification contains within itself an assumption I utterly reject --that an MCLE exemption for attorneys who practice only part time is rationally related to the goal of consumer protection. How is it rationally related? Is it rational to suppose that part-time lawyers are more likely than full-time lawyers to be aware of new laws and regulations? Certainly not. Those practicing a trade or profession only part time are less likely to be aware of new legal developments, and thus more in need of continuing education,

than those who practice full time. Is it rational to suppose that clients of part-time lawyers need less protection from incompetent representation than the clients of full-time lawyers? Certainly not. Clients of part-time lawyers are as vulnerable to the damage caused by legal malpractice, and as deserving of protection, as clients of full-time lawyers. Thus, I do not see how an exemption for part-time lawyers is rationally related to consumer protection. Indeed, I can think of no other licensing law that exempts part-time practitioners from requirements aimed at assuring professional competence. Try to imagine a law that exempts from professional competency requirements those surgeons who operate on only a few patients each year, or those commercial airline pilots who make only a few flights, or those engineers or contractors who build only a few high-rise buildings or freeway overpasses. The very idea is ludicrous.

The majority's other proposed justification may seem more plausible, but only at first glance: "Second, it would not have been irrational to conclude that, in view of their professional roles and experience, the attorneys in each of the exempt classes (again, as a general matter) are less likely than lawyers in general to need continuing education courses in order to be familiar with recent legal developments or to remain competent practitioners." (Maj. opn., ante, at pp. 19-20, italics in original.) To evaluate the rationality of this proposed justification, it is necessary to examine separately the three exempt classes attorneys and why the majority thinks that the attorneys in each class, unlike the common run of working attorneys, do not need to complete any continuing education courses.

Why does the majority think that retired judges who have resumed the practice of law

do not need the continuing education instruction required of other attorneys? In the majority's words, retired judges deserve exemption "because of the high level of legal skills and qualifications that generally are required to obtain a position as a judge, and because the daily work of a judge involves constant exposure to and analysis of on-going developments in the law . . . ." (Maj. opn. ante, at p. 20.) I find this attempted rationalization unpersuasive. The "daily work" of most judges is not sufficient to provide adequate knowledge of significant legal developments. Rather, "[p]articipation in judicial education activities is an official judicial duty." (Cal. Rules of Court, rule 970(a); see also Cal. Standards Jud. Admin. sec. 25 et seq.) The program of judicial education includes publications, classes, and seminars provided by the California Center of Judicial Education and Research (CJER). If judges need a continuing education program to perform competently as judges, why do they not need MCLE to represent clients after retirement? I assume that most judges, because of their daily work and their attendance at CJER programs, are current in their knowledge of legal developments on the day their retirements become effective. But I assume with equal justification that all attorneys are current in their legal knowledge when they first qualify for admission to the State Bar. Thereafter, however, both retired judges and recent admittees [and, indeed, all practicing attorneys) face the same obligation to promptly learn of significant legal developments relevant to the areas of law in which they practice. If recent admittees and "ordinary" working attorneys need MCLE, retired judges who choose to reactivate their State Bar membership and to represent clients have the very same need.

Why does the majority think that state

officers and elected officials do not need the continuing education instruction required of other attorneys? The majority states that "because the work of legislators and state officers is devoted, in substantial part, to the review of the current state of the law and the consideration of proposals to modify the law, or to the implementation of recent changes in the law, it would not be irrational to conclude that this group of attorneys, as a whole, may be less in need of MCLE courses than other attorneys, in order to remain abreast of recent developments in the law." (Maj. opn., ante, at pp. 20-21.)

One may question whether state legislators actually spend the bulk of their time in a scholarly study of pending and enacted legislation, rather than in political campaigning and fundraising, responding to constituent requests and complaints, meetings with lobbyists, and legislative negotiation and dealmaking. In any event, although state legislators presumably are aware of the laws they collectively enact, these state statutes are not the only significant source of law. Federal law, local ordinances, the decisions of state and federal courts, court rules, and administrative rules and regulations are all sources of new law that may affect a client's interest in a particular case. State legislators are no more likely than the average practicing attorney to be aware of legal developments from these sources. The majority's rationalization is even more tenuous as applied to other state officers and elected officials, including the Lieutenant Governor, the Secretary of State, the Controller, the State Treasurer, or the Registrar of Voters. Their offices do not require them to be aware of all new legal developments, but only those developments affecting their official duties.

officers and elected officials are likely to represent clients "in areas in which they have some particular current expertise or familiarity." (Maj. opn., ante, at p. 20.) The majority cites no factual basis for this assertion, and I question whether it is accurate, at least if the majority means that state officers and elected officials are likely to undertake representation in matters related to the performance of their official duties. As any such representation would likely result in a conflict of interest, I think it more likely that state officers and elected officials who choose to practice law on the side will do so only in matters unrelated to their official duties.

Why does the majority think that full-time professors at accredited law schools do not need the continuing education instruction required of other attorneys? The majority states that the exemption is justified "because of the outstanding academic qualifications generally required to obtain a position as a full-time professor at an accredited law school, because the work of a full-time law professor requires the intensive study, analysis, and teaching of the current state of the law, and because full-time professors at accredited law schools function in an academic setting in which lectures, publications, and frequent faculty discussions typically encompass recent developments in all areas of the law . . . ." (Maj. opn., ante, at p. 21.)

I agree that it would be ridiculous to require law school professors to attend classes in subjects they teach because their teaching activities are at least the functional equivalent of attending MCLE classes. But the State Bar's implementing MCLE regulations already allow for this by permitting

any attorney to receive MCLE credit for teaching a law school class. (State Bar Min. Cont. Legal Ed. Rules and Regs., sec. 4.1.5.) The State Bar computes the credits in this way: "Credit hours for teaching a law school class are computed by multiplying the number of credit hours/units granted by the law school by 12. If a portion of a law school class is devoted to a subject set forth in section 2.1 [that is, legal ethics, law office management, civil rights remedies, prevention and treatment of substance abuse and emotional distress, and eliminating bias in the legal profession], credit hours for teaching that subject are computed by multiplying speaking time by one. In no case may the credit hours claimed for teaching a law school class exceed credit hours/units multiplied by 12." (State Bar Min. Cont. Legal. Ed. Rules and Regs, sec. 5.4.1.)

This regulation allows full-time professors at accredited law schools to satisfy all MCLE requirements through their teaching activities. Indeed, teaching a single three-unit course would provide thirty-six hours of MCLE credit, enough to satisfy the MCLE requirement for a three year period, provided only that the course included the required number of hours in the mandatory subject area. If a full-time professor's teaching does not satisfy MCLE requirements because it does not sufficiently cover the mandatory subjects, there is no rational basis to infer that the professor is any more knowledgeable in those subjects, or any less in need of instruction, than the a practicing attorney. In view of the rule providing appropriate credit for teaching law school courses, the complete MCLE exemption for full-time professors at accredited law schools is unnecessary and unjustifiable.

Even applying the conventional rational basis test, I am unable to conclude that the challenged exemptions are rationally related to the MCLE program's legitimate purpose of consumer protection.

REMEDY

For the reasons I have given, the MCLE program as currently structured, with its existing exemptions for retired judges, law professors, and state officers and elected officials, denies other practicing attorneys equal protection of the law. There are two possible remedies for this equal protection violation. If the exemption provisions are severable, those provisions alone may be declared invalid, and the remainder of the court rule and the implementing regulations establishing the MCLE program may be enforced. Alternatively, if the exemption provisions are not severable, the entire MCLE program may be declared invalid and its enforcement enjoined. (See Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 670.)

The Court of Appeal, although unanimously of the view that the MCLE exemptions failed equal protection scrutiny, could not agree on the question of remedy. Two Court of Appeal justices concluded that the exemption provisions were not severable and the entire MCLE program was invalid, while the other justice would have permitted enforcement of the MCLE program without the exemptions.

Were three of my colleagues to agree with me and form a majority, we would have to decide the difficult question of remedy. Because a majority of this court finds no equal protection violation, however, the point is academic and I express no view on it.

CONCLUSION

Equal protection of the law "means simply 'that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" (People ex rel. Younger v. County of El Dorado (1971) 5 Cal.3d 480, 502.) Here, in effect, the majority holds that all attorneys are equal before the law, some attorneys--retired judges, law professors, and state officers and elected officials--are more equal than others. I disagree. If a formal MCLE program, administered and supervised by the State Bar, is necessary and appropriate to assure that the knowledge and skills of practicing attorneys remain current, the MCLE program requirements should be applied uniformly to all attorneys who represent private clients. Because the current court rule arbitrarily exempts certain actively practicing attorneys from the MCLE requirements, I agree with the Court of Appeal that it violates the constitutional equal protection guarantees.

KENNARD, J,.

DISSENTING OPINION BY BROWN, J.

We need look no further than the California Constitution to conclude that California's Mandatory Continuing Legal Education (MCLE) program is unconstitutional because it arbitrarily exempts certain classes of active attorneys from its requirements while imposing those requirements on others.

Article 1, section 7, subdivision (a) of the California Constitution provides: "A person may not be . . . denied equal protection of the laws . . . ." Subdivision (b) of the same section provides: "A citizen or a class of citizens may not be granted privileges or

immunities not granted on the same terms to all other citizens." Finally, article 4, section 16, subdivision (a) provides: "All laws of a general nature have uniform operation." Specifically, the latter two provisions find no counterpart in the federal Constitution, and we have interpreted them as providing greater protection that the federal equal protection clause. Specifically, we have held that the state Constitution requires "'a serious and genuine judicial inquiry into the correspondence between [a legislative] classification and the legislative goals'" (Newland v. Board of Governors (1977) 19 Cal. 3d 705, 711, quoting Dorrough v. Estelle (5th Cir. 1974) 497 F.2d 1007, 1011) and prohibits legislative classifications, such as those at issue here, that are "grossly over-inclusive' or "underinclusive." (Brown v. Merlo (1973) 8 Cal.3d 855, 877 & fn. 17; see also Utah v. Mohi (Utah 1995) 901 P.2d 991, 997) ["Utah's uniform operation of the laws provision establishes different requirements than does the federal Equal Protection Clause."] Nevertheless, the majority does not even bother analyzing the requirements of the California Constitution independently from those of the federal Constitution. The majority should apply California's equal protection standards, in which case it would conclude, as I do, that the exemptions at issue here are unconstitutional. Instead, it simply treats the California standards as if they do not exist.

I

Our state equal protection jurisprudence grew out of a recognition of the inadequacy of federal standards. Like our state cases, the federal cases recognize two primary tiers of review: "rational basis" (see, e.g., FCC v. Beach Communications, Inc. (1993) 508 U.S. 307,

313) and "strict scrutiny" (see, e.g., Shaw v. Hunt (1996) 517 U.S. 899, 907.). But, in practice, "rational basis", as used in the federal cases, means any basis, and "strict scrutiny" is "'strict' in theory [but] fatal in fact." (Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972) 86 Harv. L. Rev. 1, 8 (Evolving Doctrine).) As a result, the outcome in every case turns on how the court chooses to characterize the classification. Suspect classifications, such as those based on race or that impact rights the court deems "fundamental", warrant strict (read "fatal") scrutiny; other classifications warrant rational bases (read "anything goes") review. (FCC v. Beach Communications, Inc., supra, 508 U.S. 307, 313-316.) As Justice Mosk so aptly put it, "[t]he vice of the binary theory . . . is that it applies either a standard that is virtually always met (the rational relationship test) or one that is almost never satisfied (the strict scrutiny test.) [Citation.] Once the test is selected, the result of its application is foreordained . . . ." (Hays v. Wood (1979) 25 Cal.3d 772, 796 (conc. opn. of Mosk, J.).)

Thirty years ago, Professor Gunther recognized the inadequacy of this approach to equal protection and suggested that the high court might be moving toward "means scrutiny." (Evolving Doctrine, supra, 86 Harv. L. Rev. at p. 24.) Under means scrutiny, courts do not second-guess legislative purposes, unless, of course, those purposes contravene explicit constitutional constraints such as the right to free speech. (Id. at pp. 21-23.) Instead, courts examine the means the legislature chose, in order to insure that those means adequately advance the legislative purpose. (Id. at pp. 21, 46-47.)

Means scrutiny has the advantage of not being a subjective process that turns merely on the personal philosophies or biases of judges. (Evolving Doctrine, supra, 85 Harv. L. Rev. at pp. 42-43.) Rather, whether a law in fact furthers its purpose -- that is, whether it has proved successful over time -- is something litigants can prove or disprove based on objective criteria, and therefore it is the sort of inquiry courts are capable of making. (Id. at p. 24.) Moreover, because means scrutiny merely asks whether a law does what the legislature intended it to do, it does not interfere in the legislative process, but only encourages legislators to do their work carefully so as to avoid unintended results. As Professor Gunther argued in his groundbreaking article, "[m]eans scrutiny can improve the quality of the political process -- without second-guessing the substantive validity of its results -- by encouraging a fuller airing in the political arena of the grounds for legislative action. . . .[Par.] . . . Too often the only assurance that the [legislature] has thought about the issues is the judicial presumption that it has. Means scrutiny would provide greater safeguards that the presumed process corresponds to reality . . . ." (Id. at p. 44.)

The high court adopted Professor Gunther's proposal in a series of cases interpreting the federal takings clause. Specifically, the court held that a regulation effects a taking if it does not "'substantially advance" the 'legitimate state interest' sought to be achieved." (Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 834, fn. 3; see also Dolan v. City of Tigard (1994) 512 U.S. 374, 385; Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1016; Keystone Bituminous Coal Assn. v. DeBenedictis (1987) 480 U.S. 470, 485; United States v.

Riverside Bayview Homes, Inc. (1985) 474 U.S. 121, 126; Agins v. Tiburon (1980) 447 U.S. 255, 260.) Obviously, this requirement that the legislative means "substantially advance" legislative purposes is more demanding that rational basis review, which only requires some "rational relationship" between means and ends. (Santa Monica Beach v. Superior Court (1998) 19 Cal.4th 952, 1027-1028 (dis. opn. of Brown, J.).) More important, in Brown v. Merlo and Hays v. Wood, we adopted means scrutiny as the standard of judicial review under the state equal protection provisions.

In Brown v. Merlo, supra, we struck down an automobile guest statute that prohibited an injured automobile guest from recovering for the negligent driving of his host, except in certain narrow circumstances. (8 Cal.3d at pp. 858-859.) We noted that, if the law's purpose was to protect hospitality, it was grossly underinclusive because the law singled out "automobile guests as distinguished from all other guests." (Id. at 859; see also id. at p. 864.) On the other hand, if its purpose was to prevent collusive lawsuits between automobile guests and drivers, the law was grossly overinclusive because the vast majority of automobile guests would not file collusive lawsuits. (Id. at p. 859; see also id. at pp. 874-875.) We said, "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the class may file fraudulent lawsuits." (Id. at p. 875.)

More generally, we noted that an "overinclusive classification scheme . . . does not treat similarly situated individuals in like manner . . . ." (Brown v. Merlo, supra, 8 Cal. 3d at p. 876.) Accordingly, we held that, "[a]lthough the constitutional provisions do

not require absolute precision in the designation of classifications, they do not tolerate classifications which are so grossly overinclusive as to defy notions of fairness or reasonableness." (Id. at p. 877.) We reached the same conclusion with respect to grossly underinclusive classifications (id, at p. 877, fn. 17), and we made clear that we were construing the state Constitution and therefore were not constrained by the possibility that more deferential standards might apply under the federal Constitution. (Id. at p. 865, fn. 7.)

Thus, our holding in Brown v. Merlo instructed courts to scrutinize the means the Legislature chose to advance its purpose. Specifically, we held that if the Legislature relied on grossly overinclusive or underinclusive classifications, then it chose means that are constitutionally inadequate, and courts must strike the law down. And so as to leave absolutely no doubt about this point, we reiterated it seven years later in Hays v. Wood. In that case, we struck down a law that treated public officials who were attorneys or brokers differently from other public officials with respect to income disclosure. (Hays v. Wood, supra, 25 Cal.3d at pp. 778-779.) The Attorney General justified the statute as a protection against self-serving bias on the part of public officials, arguing that attorneys and brokers receive greater profit from their business endeavors than other persons. (Id. at pp. 788-789.) We found this justification inadequate because it was underinclusive. Specifically, we saw no reasonable explanation for "the selection of but two of the several professions having relatively high profit margins for . . . special treatment . . . ." (Id. at p. 789.) We noted that the Attorney General's argument did "no more than to shift the focus of inquiry from one dis-

tinction to another." (Ibid.) In other words, the law might be justified in treating attorneys and brokers differently from business people in general, but it was not justified in treating attorneys and brokers differently from other business people who enjoyed comparably high profit margins." (Id. at pp. 789-790.)

Significantly, we expressly rejected the federal precedents on which the majority relies today, including Williamson v. Lee Optical Co. (1955) 348 U.S. 483, saying "respondents read these cases too broadly -- at least insofar as they relate to the application of the equal protection provisions of our state Constitution." (Hays v. Wood, supra, 25 Cal.3d at p. 790, italics added.) We continued: "Werner v. Southern Cal. etc. Newspapers [(1950) 35 Cal.2d 121], which represents the definitive statement of the subject doctrine in this jurisdiction, makes it lucidly apparent that the legislative body, when it chooses to address a particular area of concern in less than comprehensive fashion by merely 'striking the evil where it is felt most' [citation] may not do so wholly at its whim." (Ibid.) Rather, "its decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (Id. at p. 791.) We held that the ultimate question is "whether there exists a reasonable basis for the legislative body to conclude that the members of [the legislative classification] made up 'the most conspicuous example of the danger it sought to preclude' [citation]." (Id. at p. 792, quoting Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 132.)

Therefore, though the federal Constitution may permit legislatures to take a shotgun approach to problem solving (see Williamson v.

Lee Optical Co., supra, 348 U.S. 483), our state Constitution insists on greater precision, and it does so by requiring courts to scrutinize the means the Legislature chose to advance its purposes. Rather than merely "rubberstamping" the legislative categories at issue here, we should be engaging in "'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals'" (Newland v. Board of Governors, supra, 19 Cal.3d at p. 711), and, more particularly, we should be asking whether the legislative classifications substantially advance the legislative purposes without being "grossly overinclusive" or "underinclusive." (Brown v. Merlo, supra, 8 Cal.3d at p. 877 & fn. 17.)

II

Applying these standards, I have no trouble concluding that the California MCLE program violates the equal protection guaranties of our state Constitution by exempting some active attorneys without exempting others who are "similarly situated with respect to the legitimate purpose of the law." (Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578.)

Rule 958 of the California Rules of Court authorized the State Bar to establish the MCLE program. Pursuant to rule 958, the Board of Governors of the State Bar adopted detailed rules and regulations that govern MCLE. These regulations created five exemptions from the program, three of which are at issue here: (1) retired judges, (2) officers and elected officials of the State of California, and (3) full-time law professors at accredited law schools.

The majority hypothesizes two purposes

that it claims justify the exemptions: (1) attorneys in the exempted categories "as a general matter, are less likely . . . to represent clients on a full-time basis . . . ," and (2) these attorneys "(again, as a general matter) are less likely . . . to need continuing education . . . ." (Maj. opn., ante, at pp. 19-20, original italics.) The majority is wrong ab initio under our state Constitution to hypothesize purposes that support the exemptions. In Brown v. Merlo, supra, we rejected "a highly fictional approach to statutory purpose." (8 Cal.3d at p. 865, fn. 7.) We made it clear that, under the state Constitution, "statutory classifications [must] bear some substantial relationship to an actual, not 'constructive,' legislative purpose." (Ibid.) We reaffirmed this principle in Cooper v. Bray (1978) 21 Cal.3d 841, 854, where we said that the purpose under consideration must be one that "can realistically be ascribed to the Legislature." The majority points to nothing in the legislative record indicating that the purposes it hypothesizes are the "actual" or "realistic[]" purposes underlying the exemptions, and, as we shall see, they are in fact, highly unlikely.

Moreover, even if the State Bar actually had in mind the purposes that the majority hypothesizes, the classifications reflected in the exemptions violate the state equal protection guaranties because they are grossly overinclusive and underinclusive and thus do not afford "similarly situated" persons "like treatment." (Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d at p. 578.) First, though it may well be true that retired judges, state officers, and full-time law professors are less likely than other active attorneys to represent clients on a full-time basis, this is only one very small selection

of the active attorneys for whom this description applies, and it is certainly not "'the most conspicuous example.'" (Hays v. Wood, supra, 25 Cal.3d at p. 792, quoting Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal. 2d at p. 132.) If the purpose of the exemptions were truly to exempt attorneys who represent clients on a part-time basis, the rule could easily have included a much broader and more precise exemption that named part-time attorneys expressly. Moreover, as Justice Kennard points out, the hypothetical purpose of exempting part-time attorneys simply makes no sense in light of the more general purpose of consumer protection that underlies the MCLE program: an incompetent part-time attorney is just as dangerous to the consumer as an incompetent full-time attorney. Indeed, the State Bar recognizes this fact by removing the exemption for state employees if they work just one hour outside the scope of their state employment. (State Bar Com. on MCLE, Guidelines: MCLE Rules and Regulations, sec. 6.1.4, eff. Sept. 1, 1995.)

Second, the majority speculates, without any empirical verification, that retired judges, state officers, and full-time law professors are "less likely . . . to need continuing education." (Maj. opn., ante, at p. 21.) While this is a comforting thought, it is a questionable premise. The majority cites "the high level of legal skills and qualifications that generally are required to obtain a position as judge," and it points out that "the daily work of a judge involves constant exposure to and analysis of on-going developments in the law." (Maj. opn, ante, at p. 20.) True. But high qualifications and exposure to on-going developments in the law are only one way in which MCLE serves its consumer-protection purpose. MCLE also requires that attorneys study legal ethics, law practice manage-

ment, and the prevention of substance abuse and emotional distress (Cal. Rules of Court, rule 958(c); State Bar, MCLE Rules and Regs., sec. 2.1), subjects which judges do not usually encounter in the course of their work. Furthermore, even if judges are somehow less in need of continuing education <u>while sitting as judges</u>, the majority does not explain why it is rational to assume they are still less in need after they have returned to private practice. As Justice Kennard points out, the purpose of <u>continuing</u> education is not to insure that lawyers are competent and knowledgeable when they first start their practices, but to ensure that they remain competent and knowledgeable as the years progress.

More important, the classifications are once again overinclusive and underinclusive. Many attorneys who are not retired judges have just as much expertise as retired judges, and at least some retired judges lack the expertise the majority imputes to them. If the purpose of the exemptions were truly to exempt attorneys who are less in need of continuing education, the rule could easily have allowed attorneys to satisfy MCLE requirements by taking a statewide examination.

The same arguments can be made about the relative knowledge and expertise of state officers and full-time law professors. While individuals in these groups may have more legal expertise than attorneys in general, the majority's assertion that, as a group, they have more legal expertise would probably fail to withstand empirical verification, particularly in the areas of legal ethics, law practice management, and the prevention of substance abuse and emotional distress. In any case, these employment categories are, at best, an imperfect basis for assessing legal expertise. And the majority's assertion that

state officers are likely to practice only in areas in which they have expertise is mere speculation and probably true about almost every attorney in the state.

If the purposes of the exemptions are in fact those that the majority has hypothesized, then the State Bar rules achieve those purposes in a ludicrously impractical way, though they could just as easily achieve the same purposes directly and precisely. That approach to legislation is not rational, and we exhibit disrespect for the legislative process when we impute such an irrational approach to our policy makers. Moreover, we undermine the integrity of the political process when we hypothesize such highly unlikely purposes in order to uphold arbitrary and self-serving exemptions.

I dissent.

BROWN, J.

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APPENDIX B

OPINION, CALIFORNIA COURT OF APPEAL

FILED
Court of Appeal-First App. Dist.
Mar 13 1997
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IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

LEW WARDEN,

Plaintiff/Appellant,

v.

THE STATE BAR OF CALIFORNIA, et al.,

Defendant/Respondent.

AO72485

Alameda Superior Court No. 734372-4

Attorney Lew Warden (Warden) appeals from a judgment in favor of the State Bar of California (Bar) and two of its employees rejecting his constitutional challenges to certain aspects of the mandatory continuing legal education (CLE) program (Bus. & Prof. Code, [fn. 1] sec. 6070).

We conclude that we must reverse the trial court's order, which granted judgment against Warden's constitutional challenge to his involuntary enrollment as an inactive Bar member, effectively suspending his license to practice law for failure to comply with the CLE program. We will hold the Bar's CLE program is unconstitutional because it violates the equal pro-

tection rights of members of the Bar who are not exempted from the program. The exemptions from the CLE program allowing currently licensed Bar members who are also officers and elected officials of the state, or retired judges, or certain professors of law, actively to practice law -- while representing clients in private practice without complying with the CLE program -- simply lack any constitutionally required rational basis. The CLE program so constituted violates the equal protection rights of attorneys who are treated less favorably without any rational basis for the less favored treatment. We, therefore, reverse and remand for entry of declaratory relief and an order reinstating appellant's right to practice law.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The CLE Program

In 1989, the Legislature enacted legislation sponsored by the Bar which ultimately provided, "The [Bar] shall request the California Supreme Court to adopt a rule of court authorizing the [Bar] to establish and administer a mandatory [CLE] program" which would require that "within designated 36-month periods, all active members of the [Bar] shall complete at least 36 hours" of approved legal education activities, including four hours of legal ethics and four more of either ethics or law practice management. (Sec. 6070, subd. (a).) If such a rule were adopted, "the

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Fn. 1. Unless otherwise indicated, all subsequent statutory references are to the Business and Professions Code.

[Bar] shall establish and administer" such a program, and any Bar member who failed to satisfy the program's requirements "shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar [Board]." (Ibid.) [Fn. 2.]

Although section 6070, subdivision (a) by its terms applied to "all active members of the [Bar]," [fn. 3.] the statute in its final form also provided a large number of exemptions from the CLE requirements, some of which are in issue here. Section 6070, subdivision (c) specified that "retired judges, officers and elected officials of the State of California," as well as full-time professors at accredited law schools, and full-time state employees acting within the scope of their employment, "shall be exempt" from the section's provisions.

The following year, our Supreme Court, required to conform, inter alia, with the statutory exemption provisions of section 6070, adopted California Rules of Court,

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Fn. 2. Since an inactive Bar member is not allowed to practice law (sec. 6006), involuntary enrollment on inactive status operates as a temporary suspension from the practice of law. (See Conway v. State Bar (1989) 47 Cal.3d 1107, 1111.)

Fn. 3. Persons who are not active members of the bar need not comply. However, many persons who are not on active status may wish voluntarily to participate in such programs. For instance, active California judges, who are not members of the Bar, have their own CLE programs. (See Cal. Standards Jud. Admin., sec. 25.)

rule 958 (rule 958). [Fn. 4.] Rule 958(b) provided that the Bar "shall establish and administer a minimum [CLE] program, beginning on or after January 1, 1991," under rules which "may provide for," among other things, "staggering of the educational requirement for implementation purposes . . . ." Rule 958(c) contained all the exemptions required by section 6070, added an exemption for full-time federal employees acting within the scope of their employment, and required that eight of the thirty-six hours of CLE "shall address legal ethics or law practice management, for hours of which shall be in legal ethics." Furthermore, "Each active member shall report his or her compliance to the [Bar] under rules adopted by [its Board]." (Rule 958(c).) In all other salient respects, rule 958 tracked the mandate of section 6070.

The Bar's Minimum CLE Rules and Regulations (regulations) provide the purpose of the CLE requirement is "to assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices." (Sec. 1.0.) In addition to the ethics and law practice management requirements, the regulations expanded on section 6070 and rule 958 by specifying that in each thirty-six hours of educational activities at least

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Fn. 4. As our Supreme Court has observed, "the membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control . . . ." (State Bar of California v. Superior Court (1929) 207 Cal. 323, 331.)

one "shall relate to prevention, detection, and treatment of substance abuse and emotional distress," and another one hour "shall relate to elimination of bias in the legal profession." (Regs., secs. 2.1, 2.1.2, & 2.1.3.) Compliance is established by a self-reporting procedure. (Id., sec. 12.0.)

The regulations defined exempt state and federal employees as those "who do not practice law in California except" as state or federal employees. (Secs. 6.1.4 & 6.1.4.) Section 6.3 established a good cause exemption from or modification of the requirements. [Fn. 5.] Section 14.2 of the regulations provides that enrollment as an inactive member for failure to comply with the CLE requirements "is administrative in nature and no hearing is required."

The Bar has issued guidelines "as advisory interpretations of the [CLE regulations]" (guidelines) which, inter alia, amplified the definitions of certain categories of attorneys exempted from CLE requirements. [Fn. 6.] (See guidelines, 1st par.)

Fn. 5. "A member may submit an application setting forth good cause for an exemption from compliance with or modification of any of the requirements, including an extension of time for compliance, in accordance with a procedure to be established by the Committee on Minimum [CLE]." (Regs., sec. 6.3.) "Should the decision be adverse to the member, the member may appeal such decision pursuant to the provisions of California Rule of Court 952(d)." (Id., sec. 6.3.1.)

Fn. 6. Under the guidelines, a retired

(footnote continued on next page)

B. Warden's Refusal to Comply

Warden, who was then 73 years old, was required as an actively enrolled member of the Bar to comply with the CLE program in accordance with section 6070. On April 23, the Bar sent him a non-compliance 60--day notice (regs., sec. 13.2), warning that he would be enrolled as an inactive member if he did not submit proof of compliance by June 22. On June 29, he was sent a final notice, advising him that on July 17 his name would be submitted to the Board with the recommendation that he be enrolled as an inactive member of the Bar effective July 19, 1993, until he complied with his CLE requirements.

On July 9, 1993, Warden wrote to the CLE compliance coordinator of the Bar contending

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(Fn. 6, cont.)
judge is one who has served as a judge of a court of record in California or other jurisdictions, has retired from the bench, and is either immediately qualified to receive retirement/pension benefits or is vested in such benefits and entitled to receive them in the future. (Sec. 6.1.1.) A full-time professor is a full-time teacher at an accredited law school regardless of academic title. (Id. sec. 6.1.3.) Full-time state and federal employees are exempt only if the sole legal work they do is within the scope of their employment. They are not exempt if they engage in any outside legal activity, including pro bono work or legal work for themselves, close friends, or immediate family. Attorneys employed by the

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that the CLE program was unconstitutional and that he could not be forbidden from practicing law for refusing to comply. On July 23, a senior administrative assistant of the Bar's Legal Unit acknowledged receipt of Warden's letter, which had been referred to the Bar's Office of General Counsel for response. On July 30, the Bar sent Warden a notice of enrollment on administrative inactive status, advising him that effective July 19, 1993, he was ineligible to practice law until the Bar received proof of CLE compliance.

On September 23, 1993, Warden wrote a letter threatening to sue the Bar for damages if it did not "forthwith recall [its] suspension order." On October 22, Assistant General Counsel Rossi responded to Warden's letters by outlining the manner in which the CLE program, including the noncompliance provisions, had been "developed at the direction of the Legislature and the California Supreme Court." She also indicated that Warden's October 7 "'Claim of Damage'" had been forwarded to the Board for review.

After the Board denied his claim, Warden filed a complaint against the Bar and its employees for compensatory and punitive damages, declaratory relief, injunction, and mandate. Warden alleged, inter alia,

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(Fn. 5, cont.)
Bar are not exempt. (Id., secs. 6.1.4. & 6.1.5.) "For purposes of 6.1.4 and 6.1.5, attorneys are exempt who are required by the [Bar] to maintain 'active' membership status as a result of the duties they are required to perform by virtue of their employment with the State of California or the United States Government." (Ibid.)

that the CLE program, as "created" and as applied, violated his right to equal protection, by exempting certain members of the Bar from its requirements.

The Bar moved for summary judgment or summary adjudication of issues. (Code Civ. Proc., sec. 437c.) After a hearing, the court granted summary adjudication of all seven issues the Bar placed before it, thus disposing of all aspects of Warden's constitutional challenge. Warden filed a motion for reconsideration. (Code Civ. Proc., sec. 1008.) After the court filed its summary judgment order, Warden filed a new trial motion. (Code Civ. Proc., sec. 657.) After hearings, the court denied both of Warden's motions. Warden filed a timely notice of appeal.

II. DISCUSSION

Warden contends the Bar's CLE program and its exemptions violates his equal protection rights. [Fn. 7.] The Bar contends its CLE program and the exemptions thereto may only be reviewed to determine whether they have a rational basis, and the Bar suggests the program and some of its exemptions may have a rational basis. We agree with the Bar regarding the scope of review, and apply only a lenient "rational basis" test. Even

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Fn. 7. Section 1 of the Fourteenth Amendment to the Federal Constitution provides that no state may deprive any person of the "equal protection of the laws." This provision is mirrored in article I, section 7 of the California Constitution, which provides "(a) A person may not be . . . denied equal protection of the laws . . . ."

under that test, however, we find no rational basis sufficient to support the CLE program and its exemptions.

A. Standing

We face an initial question as to standing. The Bar did not contend in either the trial court or in its briefs filed on appeal that Warden lacked standing to challenge the CLE program and its exemptions on equal protection grounds. On our own motion, we requested supplemental briefing on this issue. After reviewing the supplemental briefing by Warden and the Bar, we conclude Warden does have standing to challenge the CLE program and its exemptions on equal protection grounds, because he alleges his own rights to equal protection were violated by the operation of the program and the exemptions from the program for other attorneys, which taken together unfairly discriminated against him without any rational basis for the discrimination.

In the leading case from this district regarding the standing requirement for mounting an equal protection challenge, Burns v. State Compensation Ins. Fund (1968) 265 Cal. App.2d 98, the appellant made an equal protection challenge to certain exemptions contained in state insurance law, which the appellant contended were arbitrary and without a rational basis and, therefore, violated his constitutional rights. Burns stated the standing requirement for such an equal protection challenge as follows: "The first issue to be determined is whether appellant possesses the requisite standing to raise this constitutional issue. Broadly stated, this requirement is one that a party attacking the constitutionality of the statute must show some actual or threatened injury.

Accordingly, it is other stated that where, as here, a statute is alleged to be discriminatory, only a member of a class discriminated against can attack it. However, where the complaining party is injured by the legislation, although not a member of the class discriminated against, he may raise the question. [Citations.]" (Pp. 104-105.)

Appellant has standing to mount an equal protection challenge under this test. He is a member of the class allegedly discriminated against, which is composed of attorneys subject to the program and not possessing any exemption from it. He has also been injured by the CLE program, because it was the basis for the Bar's action abrogating his legal ability to practice law. [Fn. 8.]

The federal Supreme Court has reached the same result regarding the standing of a party to mount an equal protection challenge to the operation of certain exception from the coverage of the social security laws, even though it was contended he lacked standing to challenge the favorable treatment accorded others by the statutory scheme since by law he could not be accorded any more favorable treatment, even if his challenge suc-

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Fn. 8. It is clear that Warden's ability to legally practice his profession is entitled to constitutional protection against arbitrary or unconstitutional governmental abrogation. (See Spevack v. Klein (1967) 385 U.S. 511, 516; Barnard v. Thorstenn (1989) 489 U.S. 546, 553.) If Warden did not have standing to assert the unconstitutionality of the Bar's actions relative to himself, then obviously no one would have standing in any case to allege unconstitutionality.

ceeded. (Heckler v. Mathews (1984) 465 U.S. 728, 737-740.) "In this case, appellee claims a type of personal injury we have long recognized as judicially cognizable." (Id. at p. 738.) The high court also observed that a party was not deprived of standing merely because the outcome of the suit might result in withdrawing the more favorable treatment accorded to others without directly benefiting the party treated less favorably: "To the contrary, we have noted that a court sustaining such [an equal protection] claim faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.' [Citations.] For that reason, we have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." (Id. at pp. 738-739.)

The Bar erroneously relies on our decision in Searle v. City of Berkeley Rent Stabilization Board (1988) 197 Cal.App.3d 1251, 1256. There, we held that purchasers of real property lacked standing to challenge a regulation which applied solely to the sellers of real property, because the purchasers were not in the class allegedly discriminated against, and were not injured by the regulation in question. The opposite is true here, where appellant is plainly within the class allegedly discriminated against and subjected to unequal treatment without any rational basis, and where appellant has plainly suffered injury through operation of the CLE program, which was the basis for suspending appellant's

right to practice law. We conclude that appellant has standing here.

B. Scope of Review

Warden contends that we must review the CLE program under the stringent "strict judicial scrutiny" test. The Bar contends we may review the program only under the more lenient "rational basis" test. We agree with the Bar on this point.

Warden urges a higher standard, the strict scrutiny test, should be applied, because the Bar's CLE program infringed his fundamental right to earn a living by practicing as an attorney. (Cf. Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 284-288 (Piper) [A rule against practice by out-of-state attorneys was invalidated, because it discriminated against nonresidents and thereby infringed fundamental rights to equal treatment regardless of state residency under the privileges and immunities clause.].) However, for general equal protection purposes, in the absence of a suspect classification, there is no fundamental constitutional right to practice law; and a statutory classification on this subject will be upheld if it meets the "rational relationship" test. (Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328 & fn. 2.)

The Bar correctly asserts that when a statutory classification is challenged on equal protection grounds, and the statutory classification is not based, inter alia, upon suspect grounds, such as race, the statute's classification scheme should simply be analyzed to determine whether it bears a rational relationship to a legitimate state purpose. (See Del Monte v. Wilson (1992) 1

Cal.4th 1009, 1014 (Del Monte).)

However, this does not mean the courts may abdicate their responsibility to conduct "'"a serious and genuine judicial inquiry into the correspondence between the [legislative] classification and the legislative goals."'" (Cooper v. Bray (1978) 21 Cal.3d 841, 848 (Cooper), italics added by Cooper court, quoting from Newland v. Board of Governors (1977) 19 Cal.3d 705, 711.) [Fn. 9.] In making this "'serious and genuine judicial inquiry,'" we must determine whether the legislative classifications established by the CLE program are rationally related to the purposes of the program, in protecting the public from lawyers who are active members of the bar, representing individual clients, by furthering their education and training in the law, legal ethics, or law practice management. (Fn. 10.)

Fn. 9. "[T]he test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibition against special legislation and the equal protection clause of the federal Constitution." (County of L.A. v. Southern Cal. Tel. Co. (1948) 32 Cal.2d 378, 389.) We would apply a higher and more stringent level of scrutiny if this case involved regulations based upon a suspect classification, such as race, but Warden does not allege the existence of a suspect classification.

Fn. 10. The CLE program has resulted in a large number of Bar approved "providers" of CLE programs for utilization by the thousands

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C. The CLE Program And Its Exemptions Are Unconstitutional Violations of Equal Protection

The Bar contends that its CLE program and the exemptions thereto are designed to educate lawyers who represent individual clients in their practices, by keeping them current in legal developments and educating them in legal ethics, law office management, and the special problems of prevention of emotional distress or substance abuse which may arise among those who represent individual clients. Assuming without deciding that these may all be worthy goals bearing a rational relationship to a legitimate state interest (see Verner v. State of Colorado (Verner) (D.Colo. 1982) 533 F.Supp. 1109, 1118, aff'd. (10th Cir. 1983) 716 Fed. 2d 1352, 1353 [The Colorado CLE program with no exemptions for state lawmakers, retired judges, or law professors had a rational basis.]), even under the relatively deferential standard of review we apply, the exemp-

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(Fn. 10, cont.)
of California lawyers who are required to attend private, for-profit courses for CLE credit. The course offerings vary widely. They range from conventional offerings in legal practice areas to classes in such subjects as unusual techniques of "stress reduction" through chanting and meditation (Roth, Dr. Feelgood to the Lawyer's Rescue, San Francisco Daily Journal (Jun. 17, 1996) p. 6, cols. 4-5) or "Sports Nutrition" (Beyond Cholesterol Sports Nutrition & Cardiovascular Health (Inst. For Natural Resources) CLE program Sept.-Nov. 1996). While one might question the public benefit or logic in suspending lawyers from the practice of law who decline

tions implicated here which are granted from participation in the California CLE program have no rational relationship to these legitimate state interests.

Under section 6070, subdivision (c), law yers who actively practice law are exempt from the requirements of the CLE program if they are state officers or elected officials such as legislators, retired judges, full-time professors at law schools, or employees of the state or federal governments who do not represent other clients. While a rational relationship may arguably exist between the goals of the legislation and the exemptions for public employees who do not represent individual clients, we fail to see such a rational relationship in the three exemptions for state officers or elected officials, retired judges, and full-time professors who do actively represent individual clients. All of these exempted persons may represent individual clients in private practice without complying with the CLE requirements; and their exemptions do not become inapplicable (as do the exemptions for state or federal employees acting within the scope of their employment) if they act as lawyers representing individual clients.

(Fn. 10, Cont.)
to be trained in sports nutrition or other subjects which are arguably useless in benefiting those lawyers' clients, we will assume, for purposes of this appeal, that some CLE programs do contribute, inter alia, to assurances that California attorneys remain current regarding the law, legal ethics, and law office management.

We discern no rational basis for these three exemptions. The fact that a lawyer wins an election or is appointed to a state office does not mean that the lawyer is necessarily current in recent legal developments, well versed in legal ethics, or an expert in law office management. If a state officer or elected official, a retired judge, or a law professor represents individual clients in private practice, the same legitimate state interests of the public protection of such clients apply; yet these lawyers, without any ascertainable rational basis, are not required to comply with the CLE requirements which their opponents must fulfill.

Nothing in section 6070 or its legislative history shows any rational basis for this discrimination in favor of elected officials of the state, retired judges, and law professors. The only explanation for the exemption accorded to state legislators as "[e]lected officials," for instance, is an indication that the sponsor of the legislation was required to add an exemption applicable to legislators because of the opposition thereto from legislators who "'didn't want to be dragged into a classroom.'" (Sen. Bill No. 905 (1989-1990 Reg. Sess.) (Bill 905) Off. Local Gov. Affairs, Enrolled Bill Rep. (Sept. 25, 1989) p. 2.) The legislative history also seems to indicate the exemptions for retired judges and law professors were added in response to similar sentiments on the part of retired judges and law professors. Appellant and presumably numerous other attorneys also do not want to be "'dragged into a classroom,'" so this is not a rational basis upon which to distinguish between appellant and the exempted lawyers.

If these CLE program exemptions provided (as do the exemptions for state and federal

workers acting within the scope of their employment) that the exemption is lost whenever an otherwise exempt lawyer represents individual clients in private practice, their validity might arguably withstand the rational basis test of constitutional equal protection. In such a case, the Bar might well assert that the legitimate state interests in protecting members of the public from representation by lawyers who were unfamiliar with current law, legal ethics, or the requirements of law office management would support both the CLE program and its exemptions. However, that is not the case here. The very state interest cited by the Bar in support of the CLE program and its exemptions is violated by these exemptions.

In Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288, 291-301 (Raffaelli), our Supreme Court faced a closely analogous problem, where an equal protection challenge was mounted to a section of the Business & Professions Code, and a rule of court adopted pursuant thereto, which prevented resident aliens from becoming members of the Bar. Our high court invalidated the statute and rule of court as violative of equal protection principles, because they imposed a discriminatory scheme of classification without any rational basis: "We conclude that the challenged classification does not have 'a rational connection with the applicant's fitness or capacity to

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Fn. 11. Although the Raffaelli case also dealt with discrimination based upon alienage, a category subsequently subjected to the strict scrutiny standard of review, the test actually employed by the Raffaelli court as to this issue was obviously the same rational basis test which we must apply here.

practice law.'" (Id. at p. 301.) [Fn. 11.] These requirements violated equal protection by regulating Bar membership without any rational basis, since the discrimination against resident aliens who are not citizens, versus naturalized American citizens, was arbitrary and did not serve the enunciated goals of protecting the public from unethical or absconding attorneys. (Id. at p. 299.) The same is true here. The statutory discrimination in section 6070 and the parallel provisions of rule 958, adopted pursuant to the statute and containing the statutorily-mandated exceptions, do not pass muster on equal protection grounds because they lack a rational basis. (See also Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 239, fn. 5 ["[I]t is sufficient to say that a person cannot be prevented from practicing [law] except for valid reasons."] We are required to eliminate legislation or rules of court which violate equal protection by irrationally discriminating against appelland in depriving him of his right to practice law. (Raffaelli, supra, 7 Cal.3d at p. 301; cf. also People v. Hall (1994) 8 Cal. 4th 950, 963 [The court invalidated a rule of court which improperly limited the sentencing discretion of trial judges.]; California Court Reporters Assn. v. Judicial Council of California (1995) 39 Cal.App.4th 15, 33-34, review den. [A rule of court which eliminated the need for court reporters in transcribing proceedings was invalidated.]

Our Supreme Court faced another analogous problem in D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 22-24. There, the statutory classification under attack on equal protection grounds was an enactment forbidding the licensing of doctors of osteopathy as physicians, regardless of their individual qualifications, allegedly to protect the public,

although in fact the record showed doctors of osteopathy were no threat to the public and had been forbidden to practice medicine for reasons having no rational relationship to a legitimate state interest. Our Supreme Court held the legislative classification invalid on equal protection grounds, and ordered that doctors of osteopathy be considered for licensure as physicians. Thus, the constitutional requirement that state regulation of the profession bear a rational relationship to a legitimate state interest imposes upon the courts the duty of fairly testing whether the state classification scheme is consistent with the asserted state interest, here the need to protect the public.

Likewise instructive is the decision of our Supreme Court in Hays v. Wood (1979) 25 Cal.3d 772, 786-795 (Hays). In Hays, the high court invalidated on equal protection grounds a statute which imposed more onerous requirements on certain attorneys in public life than on public figures from other professions. The high court subjected this classification scheme to the rational basis test and found it invalid: "For reasons to be stated, we fail to discern the requisite rationality in the classification here adopted." (Id. at p. 787.) The high court then rejected the rationale (also urged in part by the Bar in this case) that the discriminatory legislation could be justified on the basis that the Legislature could exempt certain classes as a part of "'striking the evil where it is felt most.'" (Id. at p. 791, quoting from Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 132.) As the Hays court explained, the Legislature's "decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (25 Cal.3d at p. 791.) We discern no such rationality in the decision to "'strike'" out against almost all

California attorneys, while exempting for no rational reason a relatively small number of powerful or politically well-connected lawyers. Just as it would violate equal protection to impose a tax upon all persons, but exempt that relatively small number of persons who served in the Legislature or other important positions, we find no rational basis for the CLE exemptions in issue here.

The decision of the federal Supreme Court in Piper, supra, 470 U.S. at pages 284-288 is also instructive, even though the case was decided under the guarantee of equal treatment embodied in the privileges and immunities clause rather than on equal protection grounds. There, the federal Supreme Court found state rules regulating the practice of law and limiting it to state residents were unconstitutional because they were not supported by reasons with sufficient "'substantiality'" (id. at p. 285) in terms of protection of the public from unethical lawyers. The same is true here, where we consider the CLE program and its exemptions, which without any rational basis would allow, as to certain favored attorneys, the perceived evil which the CLE program seeks to prevent. We also observe that our ruling is fully consistent with the recent holding of our Supreme Court in People v. Ngo (1996) 14 Cal.4th 30. In Ngo, our Supreme Court held that compliance with the CLE program was not necessary in order to achieve professional competence, and observed that there was a "'lack of any statistical evidence clearly demonstrating a direct, positive correlation between [CLE] and attorney competence.'" (P. 37.) Similarly, it seems obvious that no statistical evidence demonstrates a rational basis for concluding a currently licensed lawyer, who is a retired judge from any state, an officer or elected official of this state, or a pro-

fessor of law, is consequently more competent than other lawyers in such matters as legal ethics or law office management. Nor does statistical evidence provide a rational basis to support the proposition that a retired judge of five years or more bench experience (see fn. 14, post) primarily devoted to routine criminal matters, for example, who then commences a private law practice should be exempt from CLE requirements, the purpose of which, inter alia, is to ensure his currency in legal matters, while a lawyer who has been in private practice continually for the same or a longer period must meet those requirements for the same purpose.

The Bar also suggests, despite an absense of support in the legislative history or the proceedings below, that the exemptions to the statute may be justified on the unusual theory that the exempted lawyers lawyers are generally less likely to represent individual private clients than other lawyers who are not exempt. For multiple reasons, we must reject this theory postulating a claimed rational basis to support the exemptions in question.

First, as heretofore noted, this theory finds no support in, and is inconsistent with, the legislative history of the statute. That history indicates the exempted groups were added in piecemeal fashion, benefiting certain lawyers who were serving in the Legislature or otherwise and did not wish to be "'dragged into a classroom.'" (Bill 905, Off. Local Gov. Affairs, Enrolled Bill Rep. (Sept. 25, 1989) p. 2.) The exemptions were not designed to benefit all lawyers who did not represent individual clients, and in fact apply to the exempted lawyers regardless of the number of clients they represent.

Second, this theory is inconsistent with the plain language of section 6070, which applies to all nonexempt lawyers regardless of whether they represent few or many clients. There are numerous lawyers who do not ever represent individual private clients, and yet who are not exempted from the law. Lawyers who are employed by cities and counties, by district attorneys, by school districts, by banks and other corporations, or by universities and colleges, are all covered by the statute, without any exemption. It is clear that the purpose of the exemptions was not simply to exempt those lawyers who do not represent individual private clients, or who represent only a few clients, or only do so infrequently. [Fn. 12.]

Third, the record before us does not support the notion that active members of the bar in the exempted categories represent fewer clients than other lawyers. While there may be some lawyers such as legislators, retired judges, professors, and others who do not actively represent any individual clients, they generally opt for inactive status, and as such are exempted from CLE requirements. The exemptions in question here, however, would exempt certain actively enrolled lawyers, e.g., a prominent civil litigator with numerous clients who also happens to be a legislator, a class action specialist who happens to also be

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Fn. 12. If this were the true purpose of the exemptions in question, they would be limited to persons who do not represent private clients, as are the exemptions for state and federal employees.

a law school professor, [fn. 13] or a senior partner in a law firm who is also a retired judge [fn. 14] would all be exempt. By no stretch of the imagination can the exemptions for these lawyers be rationally justified on the grounds that they do not represent individual clients. [Fn. 15.]

Fn. 13. A law professor's regular teaching duties might well satisfy part of the CLE requirement. However, regular teaching of the law would not satisfy the specific requirements for education in the areas of legal ethics, law office management, or the elimination of bias in the profession, except in the case of a professor who happened to teach all three subjects in a given compliance period. Aside from this, however, a law school professor would be exempt from CLE requirements even though the professor also had a substantial private practice representing clients.

Fn. 14. For example, judges with only five years of service on the bench who meet certain other statutory criteria under the Government code would leave the bench "entitled to receive [benefits] at some time in the future"(guidelines, sec. 6.1.1, subd. 2b.), resume private practice, and yet be exempt from the CLE program forever, simply because they would qualify as "retired judges" by statute (sec. 6070) and regulations promulgated by the Bar (sec. 6.1.1). (See Govt. Code, secs. 75033.5 & 75522, subd. (a).)

Fn. 15. The 1989 Legislature which adopted these exemptions was guided by lawyers. Both the Speaker of the Assembly and the President

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Moreover, our duty under Cooper, supra, is to conduct a "'serious and genuine judicial inquiry'" (21 Cal.3d at p. 848 -- not merely to accept whatever after-the-fact rationalizations might be proffered by the Bar in arguments in briefs, without support in the legislative history or the record under review. Neither the legislative history of section 6070 nor the record before us supports the Bar's theory; no member of the Bar or other person involved in the design of the CLE program was willing to declare under penalty of perjury that the exemptions were based upon this theory, because plainly they were not.

Thus, section 6070 as implemented by rule 958 violates the equal protection clauses of the Fourteenth Amendment of the federal Constitution and article I, section 7 of the California Constitution.

D. The Proper Remedy

We and our concurring and dissenting colleague agree that the exemptions of section 6070 are unconstitutional as to Warden, and

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(Fn. 15, cont.)
Pro Tem of the Senate were lawyers, and both houses contained numerous lawyers (including at least one law school professor). (Cal. Legis. Handbook (1989) pp. 45-53, 225-234.) The membership of the 1989 Legislature adopting these exemptions also included physicians, dentists, and teachers. (Ibid.) We are aware of no legislators in nonlegal professions who have been exempted from continuing education programs or proficiency testing in their professional fields based solely on holding a state office.

that he is entitled to be reenrolled on the Bar's active list.

Our disagreement centers on the proper relief to be otherwise ordered. The Bar suggests by a footnote in its brief, and our colleague also suggests, that we may judicially rewrite section 6070 by "excising the offending exemptions" (dis. opn., post, at pp. 1-2); i.e., at least those exempting from CLE requirements retired judges, officers and elected officials of this state, and full-time law professors, enrolled by the Bar as "active" attorneys. We cannot agree with this suggestion, for the following reasons:

1. Underlying Principles Implicated in the Judicial Reformation of an Unconstitutional Statute

We all recognize that California courts have in some cases reformed a statute to preserve its constitutionality. The bedrock principles courts must heed before rewriting a statute to preserve its constitutionality are these:

a. Such judicial action is a "comparative drastic alternative, to be invoked sparingly . . . ." (Arp v. Workers' Comp. Appeals Bd. (1977) 19 Cal.3d 395, 407 [The court would not reform a constitutionally infirm statute which denied equal protection to widowers who lacked a widow's statutory presumption of total dependency on a deceased spouse, for purposes of computation of workers' compensation benefits.].)

b. "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 675 (conc. opn. of Werdeger, J.) (Kopp).)

c. The court considering such judicial reform of an unconstitutional statute can only do so when it can reach both of two conclusions with confidence; "(i) [I]t is possible to reform the statute in a manner that closely effectuates policy judgment clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to [judicial invalidation] of the statute." (Kopp, supra, 11 Cal. 4th at p. 670, italics added.)

d. Judicial reformation of statutes in a way which does not closely effectuate articulated legislative policy is inappropriate under these standards. (Kopp, supra, 11 Cal. 4th at p. 654.) Judicial reformation of an unconstitutional statute is improper in any event when inconsistent with the legislative intent or when that intent cannot be ascertained. (Id. at p. 643.)

In applying these standards to the unconstitutional equal protection issue apparent in section 6070, we turn again to facets of its legislative history as a first step in deciding if the conclusions Kopp posits can be confidently reached by excision of the section 6070 exemptions for officers and elected officials of the state, retired judges, and full-time college professors.

2. Legislative History of Section 6070

By way of background, we note that prior to the passage of the legislation adding section 6070 (Stats. 1989, ch. 1425, sec. 2, pp. 6307-6308), Bar members had never been required to participate in CLE. Such legal education was promulgated on a voluntary basis for many years through programs offered by the Continuing Education of the Bar and its affiliated agencies.

The new legislation, as here pertinent, was introduced by Senator Davis on March 6, 1989. (Bill 905, 1 Sen. Final Hist., p. 630.) As originally introduced, it was egalitarian in nature, imposing the burdens of CLE on "all active members of the [Bar]" with no exemptions. (Bill 905 (Mar. 6, 1989) sec. 1.) It mirrored the Colorado program whose validity the Bar mistakenly relies on, since that program contained none of the exemptions added later to the California legislation, as we discuss post. (Verner, supra, 716 F.3d at p. 1353.)

The legislation did not survive long in this unamended form. On March 29, 1989, the matter was set for hearing before the Committee on the Judiciary on May 16; that hearing, however, did not take place. Senator Davis canceled the hearing five days before it was to take place; and rather than proceed with a hearing on the unamended version of Bill 905 with no exemptions, he instead amended the measure at the behest of his colleagues to add exemptions. (1 Sen. Final Hist., p. 630.)

The Senate amendment of June 1, 1989, to Bill 905 exempted "officers, elected officials, and full-time employees of the State of California, or of any political subdivision thereof, acting within the scope of their employment . . . ." (Sec. 1, italics added.)

When Bill 905 arrived in the lower house, the Assembly amended the exemption provision, adding exemptions for retired judges and full-time law professors at accredited law schools; it deleted the exemptions the Senate had provided for full-time employees of state political subdivisions acting within the scope of their employment -- e.g., career district attorneys, city attorneys, and county counsel -- while retaining the exemptions for state emp-

loyees similarly situated. ((Aug. 30, 1989) sec. 1) The Legislature passed Bill 905 with the Assembly amendments intact. (1 Sen. Final Hist., p. 630.)

In sum, the Legislature was presented, in the original Bill 905, with the opportunity to enact CLE without the exemptions we find deny constitutional equal protection to Warden. The Legislature rejected that legislative opportunity, further abandoning it by enacting those very exemptions.

The Bar and our dissenting colleague contend we may nevertheless excise those exemptions to return the CLE program to the status which the Legislature has already considered and declined to adopt. In this regard, the case at bench is inapposite to Welsh v. United States (1970) 398 U.S. 333 (Welsh) and the concurring opinion of Associate Justice Harlan (id. at pp. 344-367), which our Supreme Court in Kopp, supra, recognized as the seminal authority for the judicial power of reformation to preserve constitutionality (11 Cal.4th at pp. 627-629).

Welsh involved a federal statute extending draft exemption to conscientious objectors on religious grounds. Justice Harlan, finding the statute unconstitutionally underinclusive, approved the extension of the statutory conscientious objector benefit to persons who claimed that status on non-religious grounds. He rationalized this statutory reformation because he found Congress's prior "longstanding" tradition of extending draft exemption to conscientious objectors indicated the Congress would prefer extension of the conscientious objector benefit rather than its exclusion. (398 U.S. at pp. 365-366 (conc. opn. of Harlan, J.).)

Section 6070 had no "longstanding" legis-

lative substance or prior tradition to indicate any past legislative preference for any CLE program at all; and most critically, there is no historical basis to any claim that the Legislature would have preferred the extension of the burden of CLE training to classes of lawyers it specifically exempted therefrom, after rejecting the clear opportunity in the original version of Bill 905 to do so.

Nothing exists in the legislative history of section 6070, or any legislative tradition concerning CLE of the Bar, causing us to conclude with confidence that excision of its exemptions from CLE would "closely effectuate[] policy judgment clearly articulated by the enacting body," and that the Legislature would have preferred its rejected original version of the statute sans exemptions to its judicial invalidation. (Kopp, supra, 11 Cal.4th at p. 670.) [Fn. 16.]

3. The Mere Enactment of a Statute Does Not Allow Us to Judicially Reform It

The Legislature's enactment of an unconstitutional statute on a given subject does not per se establish with confidence that the Legislature would prefer judicial

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Fn. 16. Moreover, the statute in question here does not contain any severability clause. Although the absence of such a clause is not necessarily determinative, it is one factor to be considered in deciding whether a portion of the statute could be judicially reformed through severance or excision. (See Legislature v. Eu (1991) 54 Cal.2d 492, 535; City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 275.)

reformation over invalidation to cure the constitutional defect. The excision proposal necessarily assumes we may judicially reform the unconstitutional aspects of section 6070 challenged by Warden, by extending the CLE burdens it imposes to classes of lawyers exempted therefrom by the Legislature, simply because the Legislature legislated on the subject of CLE

The rationale of that position is this: A confident and conclusive presumption arises from the mere fact of section 6070's enactment that the Legislature would have extended the burdens of CLE requirements to classes of lawyers it specifically exempted therefrom, had it foreseen those exemptions would result in an unconstitutional statute; i.e., that in enacting section 6070, the Legislature evinced a desire to establish CLE albeit with certain exemptions; and if section 6070 is declared unconstitutional rather than reformed to extend the burden of CLE to the lawyers the Legislature specifically exempted therefrom, that legislative policy decision to enact CLE will be thwarted.

An identical rationale for reformation of statutes enacted by initiative was rejected by a majority of our Supreme Court in Kopp. In Kopp, certain provisions of Proposition 73, an initiative campaign reform measure involving Government Code sections 85301-85304 limiting the amount and pace of political contributions, had been declared unconstitutional in Service Emp. Intern. v. Fair Political Prac. Comm'n (9th Cir. 1992) 955 F.2d 1312 (cert. den. 505 U.S. 1230). Our Supreme Court first held Service Emp. Intern. did not, on full faith and credit grounds, proscribe its authority to judicially reform the initiative statutes to cure their unconstitutionality. Proceeding to that judicial reform issue, a majority of

the Kopp justices found that such authority should not be exercised because it was not possible to determine with confidence that the electorate would have preferred the reformation proposed by the dissenting justices over invalidation. [Fn. 17.]

The dissenters' rejected position in Kopp was predicated, in part, on the same rationale the dissent posits here: Judicial reformation should be undertaken because the initiative measure showed voters clearly wanted political contribution limits, and without the reformation the dissenters urged, "'invalidating a statute would be far more destructive of the electorate's will.'" (Dis. opn., post, at p. 5.) Kopp, of course, rejected reformation of the law before the court on that basis, even though that case, unlike this one, involved an initiative passed by the "electorate." (11 Cal.4th at pp. 670-671.)

We emphasize again our Supreme Court's observation that "close and careful [judicial] scrutiny" must be exercised in deter-

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Fn. 17. Four justices explicitly indicated agreement with this principle: Then Chief Justice Lucas (Kopp, supra, 11 Cal.4th at p. 670), Justice Mosk, (id. at pp. 674-675), Justice Werdegar (id. at p. 678), and Justice Kennard (id. at p. 679 ["I would so determine were I to reach that question . . . ."]). Moreover, even the three dissenters in Kopp (Justices Baxter, Arabian, and then Justice George) based their plea for reformation upon the greater need for reformation of voter-approved initiatives, a consideration which does not apply in this case. (Pp. 685-686.) mining whether the body enacting unconstitutional legislation would have preferred

"a given reformation construction to invalidation." (Kopp, supra, 11 Cal.4th at p. 661, fn. 58.)

"[C]lose and careful scrutiny" is not generated by the simple assumption that the Legislature, because it legislates, albeit unconstitutionally, on a given subject such as CLE, always thereby also expresses a clearly inconsistent desire for a judicially reformed statute on that subject, rather than invalidation of the legislation. Close and careful scrutiny by the judiciary is not so simple. If it were, courts on that basis would arguably have carte blanche to judicially reform all unconstitutional legislation on any subject legislated upon. Thus, no statute would ever be declared unconstitutional, with a judicial reservation of the opportunity of the Legislature to readdress the subject upon which it enacted an unconstitutional statute.

We must rely instead in this analysis on the applicable teachings of Kopp, on which (as we discuss in the next section) not only a majority, but all the justices seem to have agreed. (See fn. 17, ante.) A statute may not be judicially reformed to preserve its constitutionality unless the court can with confidence conclude: Such reformation closely effectuates policy judgments clearly articulated by the enacting body, and the enacting body would have preferred the reformed construction to invalidation of the statute. Neither of these conjunctive inquiries is affirmatively answered by the simple observation that because the Legislature unconstitutionally acted on a particular subject it must have preferred judicial reformation to revocation.

4. No Authority Supports Reform of

Underinclusive Legislation by Extending Its Burdens Rather Than Its Benefits.

California cases judicially reforming, instead of invalidating, underinclusive statutes violating the equal protection clause have uniformly done so by extending the benefits of such statutes to those excluded therefrom. No such statute has been so reformed by extending the burdens it imposes to persons expressly exempted from those burdens by the Legislature.

We begin this portion of our analysis by restating that the issue here is not solely whether we lack the authority to reform an unconstitutional statute. Rather, the issue is whether the statute may be reformed under the Supreme Court's teachings summarized in Kopp: Can we affirmatively reach the conclusions that the exemption excision proposed by the Bar effectuates a policy judgment of the Legislature clearly articulated, and that the Legislature would have preferred the excised version of the statute to its invalidation? (11 Cal.4th at p. 670.)

This case involves authorization imposing for the first time the burden of CLE training on certain California lawyers as a condition to practicing law. Adoption of the Bar's proposal, to excise the exemptions of classes of attorneys from CLE, plainly would have the effect of extending the burden of CLE to other classes of lawyers that the Legislature specifically declined to so burden when presented with that opportunity.

We recognize that in some equal protection cases, distinguishable from this case, a

court's extension of statutes reflects a judicial effectuation of "broad legislative policy judgments granting benefits to a named class, while declining to respect other policy judgments improperly limiting those benefits to the named class." (Kopp, supra, 11 Cal.4th at p. 652, italics added.) However, section 6070 is a statute that conferred burdens, not benefits, on lawyers, and the excision reform the Bar posits extends only the burden of CLE to exempted classes of lawyers.

We have found no case, and neither the Bar nor our dissenting colleague present one, where an underinclusive statute violating the equal protection clause has been judicially reformed, by excision or otherwise, to extend its burdens to persons the Legislature has expressly exempted therefrom. [Fn. 18.] The reason is obvious in the case a bench. The imposition of legal burdens such as CLE is generally an exclusive function of the Legislature through statutory enactment, not a function of the judiciary. When the Legislature has expressly granted exemptions from the burdens its enactment imposes, neither the Kopp principles applicable to judicial reform of an unconstitutional statute, nor common sense, supports the transparent legal fiction that a diametrically opposed judicial inference thereby exists: that the Legislature nonetheless clearly articulated a contrary policy judgment to impose such burdens on the very classes

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Fn. 18. For examples of cases concerning statutes which cannot be reformed under the Kopp standard, see 11 Cal.4th at pages 653-660.)

it exempted therefrom. [Fn. 19.]

We turn now to review of some of the cases dealing with equal protection and extension of benefits and other cases relied upon by the Bar and the dissent. First, Hays, supra, 25 Cal.3d 772, the only case cited by the Bar in support of its excision theory, was a case wherein the Political Reform Act of 1974 (Gov. Code, sec. 81000 et seq.) had set at $1,000 the threshold for public disclosure of any payment made by clients of attorneys and brokers who were public officials. Public officials in other businesses were required to disclose such names of clients only where payments for professional services reached $10,000. Hays, while upholding the statutory concept of disclosure requirements, reformed the statute to extend to attorneys and brokers the benefit of the higher dis-

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Fn. 19. Our dissenting colleague recognizes that the "discriminatory exemption" in issue here violates equal protection because of the burden it places on those not exempted. (Dis. opn., post, at p. 2.) However, he then reasons that this burden of CLE compliance is really a "'benefit'" to the public (id., post, at p. 3, fn. 3), without explaining, for example, how programs he properly describes as "quaint" would benefit the public which bears the ultimate burden of paying for them through legal fees charged by lawyers required to attend (id, post, at p. 4, fn. 4). This analysis is whole inconsistent with Kopp, supra, 11 Cal.4th at page 670. No case supports the proposition that a legislative burden may be extended in reforming a statute to persons

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closure level of $10,000 which all other public officials were given. Hays did not extend the burden of compliance with the more onerous legislation of all public officials, and Hays did not support such a theory. Nor do any of the cases cited by our dissenting colleague.

Hayes v. Superior Court (1971) 6 Cal.3d 216, 223-224, on which the dissent relies, is also inapposite. There the court reformed a statute to extend its benefits to out-of-state convicts convicted in California who were previously excluded therefrom. "[A] reviewing court may correct a discriminatory classification by invalidating the invidious exemption and thus extending statutory benefits to those whom the Legislature unconstitutionally excluded." (Id, at p. 224, italics added.)

Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 331, which the dissent cites in passing, did not involve the

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(Fn. 19, cont.)
expressly exempted therefrom because some "benefit" to the public can be found in the overall legislative purpose in enacting the statute. Substantially all legislative enactments are at least theoretically passed for some public benefit. The judicial reformation section 6070 the dissent urges would simply subordinate a legislative directive that persons be free of a statutory burden, to the second guessing of a court that the Legislature's policy was nonetheless to impose that burden on exemptees because of some overall public benefit the Legislature intended in enacting the legislation on CLE with those exemptions.

reformation of a statute; it involved the constitutionality of separate statutes enacted by an initiative measure containing a severability clause, and is inapposite for that reason alone. Further, Santa Barbara was not a case in which a statute was judicially reformed so as to exclude statutory burdens to persons previously specifically exempted therefrom, and lends no support to that theory. (Accord, Welsh, supra, 398 U.S. at pp. 361-367 (conc. opn. of Harlan, J.).) [Fn. 20.]

The public "'benefit'" argument of the dissent for excision simply reiterates, in slightly different form, the proposition we have already rejected, that section 6070 should be reformed simply because CLE legislation was enacted. It too ignores the Kopp court's rejection of an identical contention. and implicitly rejects the Kopp rules stating the criteria of a court must apply when urged to judicially reform an initiative or legislative statute.

Moreover, the language the dissent relies on from Gerken v. Fair Political Practices Com. (1993) 6 Cal.4th 707, 721-722 (conc. opn. of Baxter, J.), decided prior to Kopp, does not support the argument that "excision" (dis. opn., post, at p. 2) should be applied to section 6070 to achieve some portion of the legislative purpose in legislating upon CLE. The initiative measure under

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Fn. 20. In Del Monte, supra, 1 Cal.4th 1009, the court reformed a statute by extending the benefits of a tax exemption to veterans who were excluded therefrom because not California natives or residents upon entry into service. That decision did not extend the burden of taxation to previously exempted veterans.

consideration in Gerken contained a severability clause 96 Cal.4th at p. 714), unlike the legislation in this case. To paraphrase Gerken, severability of a statute depends upon whether the remainder of the statute, post-severance, would have been adopted by the Legislature had it foreseen the statute's partial unconstitutional invalidity. (Pp. 721-722.)

First, this statement does not establish the criteria to be applied by a court in concluding with confidence whether the statute as judicially modified would have been adopted by the Legislature. Kopp does.

Second, Justice Baxter, and his two co-dissenters in Kopp, specifically concurred in that portion of then Chief Justice Lucas's analysis therein of such criteria at part IV of Kopp. (11 Cal.4th at pp. 660-661.) "I concur in all aspects of parts III and IV of the lead opinion." (Id. at p. 685 (dis. opn. of Baxter, J.).) Thus, all the justices in Kopp concurred in its analysis of criteria to be applied before judicially reforming an unconstitutional or statutory measure. [Fn. 21.]

In sum, no judicial speculation is necessary in this case as to whether the Legislature might have preferred, as a policy matter, the extension of any statutory benefit it granted to other persons not included in

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Fn. 21. United States v. Jackson (1968) 390 U.S. 570, 585, also relied on by the dissent, did not expand the burden of the death penalty for kidnapping; it reformed a statute to strike that burden, eliminating it as a punishment for that crime, while leaving the kidnapping statute otherwise intact.

the statute as being entitled thereto. Statutory burdens, not benefits, were imposed by section 6070. When the Legislature refused the opportunity in the first version of Bill 905 to extend the burden of CLE to all actively enrolled lawyers in favor of amendments specifically exempting certain classes of lawyers therefrom, it clearly articulated a policy judgment diametrically opposed to the Bar's excision proposal here which, if adopted, would substantially restore the very CLE pro gram the Legislature rejected.

The dissent's excision argument is not strengthened by the fact that section 6070, as amended to exempt state officers and elected officials and others, passed by a large margin. No cases are cited supporting the theory that legislation which passes by a large mar gin in an unconstitutional form is more likely to be judicially reformed than other legislation. Once legislation is enacted, we are bound to examine it for purposes of all judicial review without regard to the division of votes that led to its legislative passage. This contention also misses the signal fact that it was the amended version of section 6070, including those exemptions here germane, which passed by a large margin. Assuming arguendo the viability of the theory that legislative intent is somehow determined by counting up the legislators' votes for and against the statute under judicial scrutiny, we logically know from the passage of the version containing those exemptions by such a large margin that the legislators favored those exemptions by large margins; and that apparently very few legislators, if any, favored the version of the legislation which the dissent would adopt by judicial reformation. Those facts,

if assumed arguendo to be relevant, would not allow us to conclude with confidence that the dissent's proposed reformed version of the statute would have passed in the Legislature. They compel the opposite conclusion.

At oral argument counsel for the Bar made certain statements regarding the allegedly small number of lawyers who were exempted from the CLE requirements by the legislation. Those statements simply involved counsel's estimates which are not in evidence and are nowhere supported by the appellate record. More importantly, there is no authority for the proposition that a factor to be considered in the judicial reformation of an unconstitutional statute is the alleged paucity of the number of persons to whom its exempted burdens are proposed to be judicially extended. The unconstitutional law in Kopp, supra, also governed only campaign contributions to a relatively small number of elected officials and their opponents, but our high court did not rely on the small number of persons affected as a means to judicially reform the initiative measure imposing the burden of statutory compliance on that small number of people, just as we may not impose the burdens of CLE compliance upon state elected officials and others through judicial reformation here. [Fn. 22.]

Fn. 22. The numbers cited by the dissent also give an incomplete picture of the impact of the exemptions, which as a matter of common sense include many exempted lawyers, by virtue of the various exemptions for offi-

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In sum, we cannot confidently conclude the Legislature clearly articulated a policy judgment that it would have preferred a reformation of the statute which imposes CLE on classes of attorneys it specifically exempted from its burdens, over invalidation and the consequent legislative opportunity to reexamine the subject legislated upon. The judicial reformation of statutes cannot be predicated upon an evidentiary and intellectual void.

A final but related factor posited by Kopp, applicable to the consideration of judicial reform of an unconstitutional statute, is this: Is it "at least as likely that the [Legislature] would prefer to start anew in order to create a comprehensive and coherent [constitutional] scheme, rather than settle for a makeshift and ill-fitting law that might actually hamper future [CLE] reform by creat-

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(Fn. 22, cont.)
cers and elected officials of the state, retired judges, the many lawyers who are state employees, and so on. The Legislature clearly intended to exempt and did exempt all actively enrolled lawyers from CLE training who are retired judges, officers and elected officials of the state, including legislators and their legal staffs; law professors who teach full-time at certain accredited law schools; and all lawyers employed by the state acting within the scope of their employment. No support exists in logic or the record before us for a confident conclusion that these exemptions were merely coincidental, and that the statute would have passed in the form the dissent proposes without those expressly adopted exemptions, because of any overriding legislative policy decision to establish a requirement for CLE training.

ing the illusion that full and complete reform had been achieved"? (11 Cal.4th at p. 670, italics added.)

This query is particularly pertinent here. If we were to follow the Bar's excision proposal, thereby creating the illusion of full and complete reform of a statute thus seemingly impervious to constitutional challenge, a subsequent equal protection challenge may well arise to section 6070 by reason of matter not directly before us in this appeal, but implicated by that proposal, which the Legislature may well wish to address. What is the rational constitutional basis for exempting full-time state lawyers acting within the scope of their employment from CLE, and denying the same exemption to lawyers similarly situated who are employed by other political subdivisions of the state, such as cities and counties? Further, the Legislature may wish to address the question of whether the Bar departs from its charter under section 6070 and rule 958 by granting CLE credit for certain courses it apparently approved under the rubric of prevention or treatment of emotional distress, [fn. 23] which in the words of one commentator in-

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Fn. 23. Section 2.1.2. of the guidelines provides: "'Emotional distress' may include instruction on how to deal with stress. . . . [Par.] . . . [P]revention, detection and treatment of emotional distress may address generic issues of . . . emotional distress in society in general and need not focus solely on problems which attorneys encounter in the legal profession." (Italics added.) Neither section 6070 nor rule 958 provides for CLE credit for inst-

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struct, inter alia, on such pressing legal and educational issues as "finding a new job, chanting your way to a more efficient law practice or dieting for [CLE] credits . . . ." (Kraw, Class Room Capers, San Francisco Daily Journal (Jan. 7, 1997) p. 4, col. 5.) We again note that the stated purpose of CLE is "To assure that, throughout their careers, California attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices." (Regs., sec. 1.0.) [Fn. 24.]

The dissent correctly observes that these questions are not directly before us,

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(Fn. 23, cont.)
ruction in generic issues of societal emotional distress unrelated to the legal profession. That concept seems to have been added by the Bar on its sole initiative, without any express basis therefor in either legislation or rule of court.

Fn. 24. By contrast, a continuing education program for physicians was established for the protection of the public, which has no exemptions for members of the Legislature, state or federal employees, retired physicians who still practice medicine, or medical school professors. (Secs. 2190 & 2190.1.) This program also carefully sets forth the requirements for approval of education programs, and specifies that course content must be directly related to patient care. (Sec. 2190.1; Cal. Code Regs. tit. 16, sec. 1337.5) All the requirements of that program, as opposed to the one in issue here, have a rational basis in the need to protect the public by keeping active practitioners current in their discipline.

but errs in concluding that their consideration on the issue of judicial reformation of section 6070 is, therefore, impermissible. Kopp posits an analysis of such factors as an important part of the calculus on which such judicial reformation is grounded. A single example illustrates the wisdom of such analysis: A strong possibility exists that an equal protection challenge similar to Warden's will be mounted on behalf of full-time attorneys employed by political subdivisions of the state denied exemption from CLE (for which their public employers may pay) [fn. 25] which is afforded their state counterparts.

To excise the exemptions as the Bar and dissent urge, and thus bypass legislative reconsideration of a statute we have held is unconstitutional, would encourage courts to further reform section 6070 on a piecemeal basis, triggered by successive lawsuits asserting the violation of equal protection to such other lawyers not exempted from CLE requirements. By such means, the court would simply and impermissibly become deeply enmeshed in a role which in the circumstances

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Fn. 25. Bill 905, which enacted 6070, also included a legislative declaration stating it was was "the intent of the Legislature" that local governments should pay the costs of CLE courses for their lawyer employees. (Stats. 1989, ch. 1425, sec. 3, p. 6308.) Thus, local governmental entities not exempted by section 6070, which in obedience to the Legislature's expressed intent paid for CLE compliance courses for their employees, could also have standing to challenge the law. (Cf. County of Ventura v. State Bar (1995) 35 Cal.App.4th 1055, 1057-1060.)

of this case is reserved to the Legislature. We owe deference to that role.

In sum, we recognize that the enactment of a constitutional and beneficial CLE program is, in the first instance, a legislative and not a judicial function. We are here required, however, by Kopp, supra, to apply the legal criteria stated in that case, in measuring the dissent's argument for judicial reformation of an unconstitutional statute through excision of portions of the present CLE statute. We are unable to conclude with confidence that the Legislature would prefer, as a clearly articulated policy, to subject its own members, retired judges, and others to the CLE program which it explicitly exempted them from; and thereby retain a CLE program seemingly impervious to further constitutional challenge, but in fact subject to successive waves of lawsuits aimed at gradually invalidating additional statutory exemptions.

The Legislature, in our view, will more likely prefer invalidation of section 6070, allowing it to start anew and initiate comprehensive legislative reform of CLE, rather than accept a judicial reformation of section 6070 mandatorily expanding the burden of CLE training to those the Legislature specifically exempted therefrom.

E. CONCLUSION

We unanimously hold the CLE program as specified in section 6070 to be unconstitutional. We also decline, by majority vote, to adopt the Bar's proposal for judicial reformation of the statute in order to lessen the equal protection problems manifest in section 6070. No California case has yet supported judicial reformation of a statute

by extension of legislatively imposed burdens to members of a class the Legislature has expressly exempted therefrom, to cure an underinclusive statute denying equal protection of the law. While the Bar's implicit suggestion is that for reasons of both the public interest and constitutional theory the best CLE program would be one exempting no actively enrolled lawyers therefrom, that is not what the Legislature passed. It had the clear option and opportunity to do so, and declined to enact such a statute.

We simply cannot conclude with confidence that any particular form of the statute which we might create by "excision" would actually reflect the clearly articulated policy choices of the Legislature. [Fn. 26.] Those policy choices are matters for legislative, not judicial determination. We must invalidate the statute so that the Legislature may consider reforming it by enactment of a new, constitutional version; or await the creation by our Supreme Court of a replacement for rule 958, uninhibited

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Fn. 26. While we do not want to throw the baby out with the bath water as our dissenting colleague suggests we are doing (dis. opn., post, at p. 1), we simply lack the authority in the circumstances of this case to leave a portion of the baby in the bathtub by adopting the Bar's "excision" or "amputation" proposals. The law in question specifically exempts retired judges, legislators, and others. We would reach the height of judicial activism by "reforming" the statute so as to require those exempted lawyers to take CLE courses where there is no law now in existence requiring them to do so.

by unconstitutional exemption provisions.

In sum, we hold the CLE program is unconstitutional. It violates equal protection, by forcing some attorneys licensed by the Bar who represent individual clients in private practice, and not others, to comply with the program for reasons having no rational relationship to a legitimate state interest. The CLE program cannot be judicially reformed to close its irrational exemptions, consistent with a clearly articulated policy judgment by the Legislature and without violating its express and evident intention. Therefore, we conclude section 6070 and the CLE program adopted pursuant to section 6070, including rule 958, violate Warden's constitutional right to equal protection of the laws. [Fn. 27.]

III. DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with instructions to enter a new and different judgment declaring that section 6070 is unconstitutional, and embodying a mandatory injunction requiring the Bar to reinstate Warden to active membership. Costs are awarded to Warden.

PETERSON, P.J.

I CONCUR:

SNOWDEN, J.*

Fn. 27. Our disposition moots certain other

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contentions raised by appellant, and we need not address them at length. Specifically, we do not find that appellant's rights were violated based upon his age or his last name, which governed the onset of initial period for CLE compliance. We also conclude the Bar and its individual officers may not be sued for damages, as opposed to injunctive relief, for violation of appellant's civil rights or violation of a covenant of good faith and fair dealing, simply because they applied section 6070 as written to appellant. (See Verner, supra, 533 F.Supp. at pp. 1112-1115.) We also decline to address appellant's due process challenge, which is moot in light of our conclusion as to the equal protection issue. In addition, we do not address any questions arising under the First Amendment to the federal Contitution or the broader free speech guarantee contained in the California Constitution (art. I, sec. 2, subd.(a)) because those issues are not briefed or presented for review in this case.

* Judge of the Superior Court of Napa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CONCURRING AND DISSENTING OPINION
CALIFORNIA COURT OF APPEAL

AO72485, Warden v. State Bar of California
Haerle, J., concurring in part and dissenting in part:

I concur wholeheartedly with practically everything in the majority's opinion save and except that much of it as deals with the relief to be granted. And even as to that I agree in part: Mr. Warden is clearly entitled to be reinstated on the "active" list of the respondent California State Bar. But I do not agree that it is necessary to declare the entirety of Business and Professions Code section 6070 [fn. 1] unconstitutional; by so doing, I respectfully submit, the majority throws the baby out with the proverbial bathwater. There is, as politicians are wont to say, a better way: by excising the offending exemptions.

I agree with the majority that the permissibility of such a remedy is governed by the recent decision of our Supreme Court in Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607 (Kopp). But, unlike the majority, I read that decision as making clear (and contrary to some earlier and conflicting precedent) that an appellate court can and should reform a partially unconstitutional unconstitutional statute when to do so would further the intent of the Legislature. I agree with the majority that we must look to part IV (id. at pp. 626-662) of then Chief Justice Lucas' plurality opi-

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Fn. 1. All further statutory references are to the Business and Professions Code unless otherwise indicated.

nion for the guiding principles. The first such principle is one repeated several times in this part of the opinion, to wit, that "a court may reform--i.e., 'rewrite' --a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (iii) the enacting body would have preferred the reformed construction to invalidation of the statute." (Id. at pp. 660-661.)

Excising the three offending exceptions is, I submit, a plainly permissible method of accomplishing such a reformation. In the first place, it is clear that the presence or absence of a severability clause (there is none in section 6070 or the statute that gave birth to it) is not determinative. This is manifest from precedent both in the United States Supreme Court (see, e.g., United States v. Jackson (1968) 390 U.S. 570, 585, fn. 27) and from our own high court (see, e.g., People v. Mirmirani (1981) 30 Cal.3d 375, 387, fn. 9; Legislature v. Eu (1991) 54 Cal.3d 492, 535; City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 275.)

We come then to the question of whether a "discriminatory exemption" [fn. 2] such as is

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Fn. 2. The phraseology is that of the United States Supreme Court in Williams v. Vermont (1985) 472 U.S. 14, 23. One scholar suggests that such exemptions are treated the same as other "underinclusive" forms of legislation. (See Tribe, American Constitutional Law (2nd ed. 1988) sec. 16-4, pp. 1448-1449.)

involved here may be excised as a means of accomplishing judicial reformation. I think it is very clear that it may. Kopp itself noted that the United States Supreme Court "tacitly followed" Justice Harlan's suggested approach in Welsh v. United States (1970) 398 U.S. 333, 361 (Welsh) and "[i]n the process it effectively, albeit not always candidly, rewrote--by elimination and by addition of words--various federal and some state statutes." (Kopp, supra, 11 Cal.4th at p. 632, emphasis on "elimination" supplied.)

Justice Harlan's seminal concurring opinion in Welsh itself speaks of "amputation" and of "eliminating the exemption" as possible remedies. (Welsh, supra, 398 U.S. at p. 364 and fn. 16.) And in Champlin Rfg. Co. v. Commission (1932) 286 U.S. 210, 234, the high court stated the rule as follows: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Aside from Kopp, our own Supreme Court has noted several times that excision is a permissible form of reformation of a partially unconstitutional statute. In Gerken v. Fair Political Practices Com. (1993) 6 Cal.4th 707, 721, Justice Baxter noted in his concurring opinion: "When provisions of an initiative statute are constitutionally or otherwise invalid, the void provision must be stricken from the statute but the remaining valid provisions should be given effect if they are severable." (See also Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 330-331; Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.

3d 805, 821, 836.)

But the principal support for the relief I would prefer to see applied here comes from our high court's decision in Hayes v. Superior Court (1971) 6 Cal.3d 216 (Hayes). In that case, the court held that a criminal defendant then in prison in Nevada, but who had been granted probation by a California court without imposition of sentence, could obtain a final disposition of his California case pursuant to then Penal Code section 1203.2a notwithstanding the fact that, by its terms, that section applied only to a person who was "committed to a prison in this State." The court ruled that the quoted limitation violated the equal protection clauses. But, it went on to hold, the appropriate remedy was to strike the limitation and thus extend the benefits of the section to those in prison elsewhere than California. In so holding, it declared: "A statutory classification which arbitrarily excludes some but not all of those similarly situated in relation to the legitimate purposes of the statute does not necessarily invalidate the entire statute. [Citations.] In light of the purposes and history of a particular statute statute or an overall statutory scheme a reviewing court may correct a discriminatory classification by invalidating the invidious exemption and thus extending the statutory benefits to those whom the Legislature unconstitutionally excluded. (Id. at p. 224.)

The majority suggests that this principle obtains when the reformation operates operates to extend benefits, but not to extend "burdens." Assuming, without conceding, that the California State Bar's Minimum Con-

tinuing Legal Education (MCLE) program can be properly classified as a "burden." [Fn. 3.] I simply do not understand why the principle so carefully articulated in Hayes must be so restricted. What possible difference does it make whether the excision of the offending portion of the statute extends benefits to those formerly denied them or extends the "burdens" of the statute to those formerly provided a "discriminatory exemption" therefrom? To me, these are nothing more than opposite sides of a single coin, and the same rule should apply in both situations.

Which brings me to the final, and certainly key, question: can we "say with confidence" that (i) the statutory reform I propose, excising the three offending exemptions, would "reform the statute in a manner that closely effectuates" the Legislature's clearly articulated policy judgments, and (ii) the Legislature would have preferred section 6070 sans exemptions to the total invalidation the majority decrees? (See Kopp, supra, 11 Cal.4th at p. 661.) I think both questions must be answered in the affirmative.

At oral argument, counsel for the State

Fn. 3. I assume the majority means a "burden" on the affected attorneys; hopefully, it would agree with me that it may not be a "burden" to clients or potential clients of those attorneys, the portion of the body politic whose interests the Legislature presumably had most in mind. As to them, I assume MCLE was seen by the Legislature as a "benefit." My point is that, here as in many other instances, one persons "burden" is another person's "benefit" and vice versa.

Bar told us that (at the time section 6070 was enacted presumably) 55 legislators and 130 retired judges were effectively exempted from the requirements of the section. Appellant did not challenge those figures. No figure was offered regarding full time law school professors, but common sense tells us that figure could not be more than a few hundred. The issue then becomes: which remedy is proper under the test laid out by Kopp, the total invalidation of the entire MCLE program as decreed by the majority or the excision of three [fn. 4] "discriminatory exemptions" which benefit no more than a few hundred California lawyers? The majority argues that, since the Legislature either could or would not pass the bill in its original "Colorado" form and grafted on the exemptions at issue here (and others), it necessarily follows that the excision route is inconsistent with its "policy judgments." I disagree for at least two reasons. First of all, I respectfully suggest that the grafted exemptions patently implicated much more than the political process of getting the bill passed circa 1989 than they did the

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Fn. 4. I stress that the only issue before us is the constitutionality of the three identified exemptions. Thus, although I appreciate the reason for the majority's reference to the different treatment the statute affords full time state attorneys and that afforded full time county and city attorneys (maj. opn. at pp. 29, 30), I would note that that issue was neither briefed nor argued before us. In the same vein, although I very much share Presiding Justice Peterson's views regarding some of the more quaint aspects of current MCLE programs (maj. opn. at p. 9, fn 10, and p. 29), again I would note that these matters are simply not before us.

Legislature's "policy judgments." Second, and contrary to the majority's reasoning, Kopp makes clear that reformation of a statute can and may be in ways that run contra to express legislative action. It noted: "In each of the numerous extension cases discussed above, a court rendered a decision that effectively reformed a statute by including within its reach that which the enacting body implicitly--and sometimes expressly--excluded." (Kopp, supra, 11 Cal.4th at p. 652.)

Finally, I note that the Legislature passed section 6070 in the same session in which it was originally introduced and within almost seven months after that introduction. The final vote in favor of passage was 24 to 2 in the Senate and 71 to 1 in the Assembly. (1 Sen. final Hist. (1989-1990 Reg. Sess.) p. 630.) The legislation was, from its inception, backed by the State Bar. These factors, coupled with the already-noted fact that the exemptions benefit only a few hundred California lawyers, suggest rather strongly to me that our Legislature would much prefer excising the offending exemptions to invalidating the entire statute. [Fn. 5.] Or, to put matters

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Fn. 5. The majority suggests that the real choice is between invalidating the exemptions and "allowing [the Legislature] to start anew and initiate comprehensive . . . reform of CLE . . . ." (Maj., opn. at p. 31.) I suggest (a) this formulation of the alternatives represents a clear leap of faith and (b) we should not be suggesting to the Legislature how to "reform" MCLE in respects that are not clearly our business. (See fn. 4, ante.)

as the Kopp court did (paraphrasing now-Justice Ginsburg of the United States Supreme Court), we can and should reform the law because "invalidating a statute would be far more destructive of the electorate's ate's will." (Kopp, supra, 11 Cal.4th at p. 661.)

In short, I would order the State Bar to re-enroll appellant in its active rolls and that the exemptions from MCLE allowed by section 6070 and the companion State Bar rule pertaining to legislators, retired judges and law school professors be stricken as being, for all the reasons so ably explained by the majority, in violation of the equal protection clauses of the United States and California Constitutions.

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Haerle, J.

APPENDIX C

CALIFORNIA SUPREME COURT ORDER DENYING REHEARING

First Appellate District, Division Five
No. AO72485

IN THE SUPREME COURT OF CALIFORNIA

SO60702

LEW WARDEN,

Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Respondent.

SUPREME COURT
FILED
OCT 20 1999
Robert Woodruff, Clerk
/s/ B. Mines
Deputy

Petition for rehearing DENIED.

Kennard, J., and Brown, J., are of the opinion the petition should be granted.

/s/ George
Chief Justice